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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JACKSON WATER WORKS, INC., and
CITIZENS UTILITIES COMPANY,
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does it violate the equal protection clause of the fourteenth amendment when state eminent domain procedures grant condemnors of investor-owned utilities a unilateral and unrestrained choice between two forums, only one of which allows condemnees a trial by jury and an appeal of right?

2. Shall the judiciary consider the interests affected and require more than a conceivable basis to sustain, under the equal protection clause, a state eminent domain scheme for fixing just compensation that denies access to the courts to some but not all identically-situated condemnees?

3. Despite the presence of a conceivable legislative purpose for a state eminent domain scheme prescribing judicial procedures for fixing just compensation, should the judiciary, upon reviewing a challenge to the procedures under the equal protection clause, decline to defer to the legislature when those procedures discriminate between identically-situated condemnees by denying, at the option of the state, trial by jury and an appeal of right?

LIST OF PARTIES

The parties to the proceeding below were the petitioners Jackson Water Works, Inc., and Citizens Utilities Company and respondents the City of Jackson, its city officials, Anthony Tomajevich, Dennis King, Wade Selman, Marvin Vicini, Michael Spinetti and James Buell, the Public Utilities Commission of the State of California, and its Commissioners Leonard Grimes, Victor Calvo, William Bagley, Priscilla Grew and Donald Vial.

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THE STATE OF CALIFORNIA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners Jackson Water Works, Inc., and Citizens Utilities Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 8, 1986.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit are reported at 793 F.2d 1090, and are reprinted in the appendix beginning at A-4.[1]

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[1] An index to the materials contained in the appendix appears at the beginning of the appendix. Citation to the appendix will be to the

The memorandum decision of the United States District Court for the Northern District of California (Henderson, J.) has not been reported. It is reprinted in the appendix beginning at A-24.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1343 and 2201, 42 U.S.C. § 1983 and the Constitution of the United States, the petitioners brought this action in the United States District Court for the Northern District of California. On February 1, 1985, the district court denied petitioners' motion for summary judgment and granted respondents' motion for summary judgment. *See* A-23.

The United States Court of Appeals for the Ninth Circuit on July 8, 1986, in a 2-1 opinion, affirmed the district court. *See* A-4. On October 16, 1986, a panel of the Court of Appeals denied petitioners' petition for rehearing and, upon a call for a vote, a majority of active judges of that court voted to reject the suggestion for rehearing *en banc*. *See* A-3.

The jurisdiction of this court to review the judgment of the Ninth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the United States Constitution, Amendments V and XIV; California Constitution Article I, § 19, Article VI, § 11 and Article XII, §§ 1 and 5; California Civil Procedure Code § 904.1, §§ 1230.010-1230.060 and § 1250.010; California Public Utilities Code §§ 1401-1421, §§ 1756-1757 and § 1759; and California Rule of Court 28. The pertinent text of those provisions and statutes is set forth in the appendix. *See* A-36 through A-54.

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appropriate pages, which are numbered consecutively, and which will be designated, e.g., A-4.

STATEMENT OF THE CASE

A. The Challenged Scheme Allows Condemnors Unilaterally To Choose Between Two Forums In Which The Condemnee Receives Significantly Different Procedural Rights

Petitioners Citizens Utilities Company and Jackson Water Works, Inc. ("JWW") brought this action under 42 U.S.C. § 1983 against the City of Jackson ("the City") and the California Public Utilities Commission ("the Commission") challenging on equal protection grounds a statutory scheme that confers upon local governments seeking to condemn investor-owned utilities the unfettered and unilateral election to litigate a constitutional right—just compensation—before either a California civil court or before the Commission. This choice is not reciprocal, but can only be exercised by the condemnor. The class of utility condemnees compelled to submit to an administrative proceeding before the Commission is deprived of a jury trial and any right to appeal, while the class of those whose property is taken in the courts is not.[2]

In upholding this statutory scheme, a panel majority of the Ninth Circuit characterized the differences between these two procedures as "constitutionally insubstantial," and held that the discrimination could be justified by a "conceivable" rational basis.

1. California Superior Court: Trial By Jury And Appeal Of Right Afforded To Condemnees

A California political subdivision that seeks to acquire through eminent domain the property of an investor-owned utility may institute and conduct such a proceeding in the California Superior Court. Cal. Civ. Proc. Code §§ 1230.060, 1250.010 (West 1982).

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[2] Petitioners emphasize here, as they have in the lower courts, that the discrimination permitted by California law and challenged in this proceeding is between and among two classes of utility condemnees. The issue presented by this petition is not whether California can treat utility condemnees differently from other condemnees, or, for that matter, subject them all to a proper administrative proceeding, but whether some utilities can be deprived of important procedural rights while identically situated utilities are not.

Both the condemnor and condemnee in such a proceeding are entitled unconditionally to have the compensation for the property taken determined by a jury. Cal. Const. art. I, § 19.

Each party to the proceeding is further entitled, again without qualification, to obtain review of that determination through an absolute right of appeal to the California Court of Appeal. Cal. Civ. Proc. Code §§ 904.1, 1230.040 (West 1982); Cal. Const. art. VI, § 11. Finally, the opportunity is also afforded the parties to seek review of the Court of Appeal's decision by the California Supreme Court. Cal. Rules of Court, Rule 28.

2. California Public Utilities Commission: Trial By Jury And Appeal of Right Denied To Condemnees

Other utilities, alternatively, can be forced to accept compensation for their property in an amount fixed by politically-appointed members of a regulatory agency, the Public Utilities Commission.[3] Cal. Const. art. XII, §§ 1, 5; Cal. Pub. Util. Code §§ 1401-1421 (West 1975). The utility condemnee has no opportunity to object, and no other ability to alter or affect the condemnor's choice of forum. Cal. Pub. Util. Code § 1421 (West 1975). The scheme provides neither standards governing the condemnor's choice of procedure nor limitations of any kind on that choice.

A Commission valuation proceeding is not conducted before a jury but by an administrative law judge who makes a "just compensation" recommendation to the Commission. The Commission then fixes the compensation to be paid to the utility. Cal. Pub. Util. Code § 1411 (West 1975).

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[3] A threshold distinction between the alternative proceedings involves the timing of the notice given the condemnee. In Superior Court, the potential condemnee must receive actual notice of the condemning body's hearing at which it votes whether to adopt a resolution of necessity, a statutory prerequisite to filing the action. Cal. Civ. Proc. Code § 1245.235. Defendants contended here that if the condemnor elects for commission proceedings, notice need not be given of the hearing on the resolution of necessity because the petition to the Commission did not commence a "proceeding" within the meaning of Cal. Civ. Proc. Code §§ 1235.165 and 1245.220.

The utility company's sole redress following the Commission's award is to petition the California Supreme Court for a writ of review. Cal. Pub. Util. Code §§ 1416, 1756, 1759 (West 1975). That court has discretion to deny or grant the petition. In ruling on that petition, the court does not even have before it a copy of the record below. Cal. Pub. Util. Code § 1757 (West 1975).

Any review granted is far narrower in scope than the appellate review available from a judgment of the Superior Court. The only issue which can be reviewed is whether the Commission has "regularly pursued its authority." *Id.* If the California Supreme Court denies the petition for writ of review, no written opinion is issued; the Commission's compensation finding is final; review of that finding by any other California court is prohibited. Cal. Pub. Util. Code §§ 1416, 1759 (West 1985).

Experience shows that the condemnee's opportunity to request discretionary review is not a meaningful right. The record below establishes that the California Supreme Court has not reviewed a compensation decision in fifty years and has granted review only three times in the seventy-year history of the scheme. The state Supreme Court has *never* reversed, modified or even remanded a single compensation decision of the Commission.

B. The City Elected To Proceed Before The Commission

The City chose to proceed under the alternative valuation procedure set forth in Cal. Pub. Util. Code §§ 1401-21. On April 10, 1984, the City filed a petition with the Commission setting forth its intent to acquire the property of JWW and asking the Commission to fix the amount of compensation to be paid. Prior to appearing before the Commission, JWW filed its complaint in the instant matter on June 4, 1984.

C. The Ninth Circuit Upheld The Challenged Scheme

The Ninth Circuit panel majority "assumed" that the important rights to jury trial and appeal are "constitutionally insubstantial" (A-10), and that the constitutional right to just compensation is a mere "economic" interest (A-8). In a rigid equal protection analysis, the lower court deemed itself unable to consider the significant interests affected by the state scheme.

In a dissenting opinion, Judge Pregerson rejected the notion that a jury trial and a meaningful appeal are constitutionally insubstantial. Furthermore, Judge Pregerson criticized the majority's refusal to follow two controlling decisions of this Court which hold that unequal distribution of rights to jury trial and to appeal violates equal protection. Finally, Judge Pregerson rejected the majority's rationale for the arbitrary choice given to City condemnors as having an overly attenuated connection to the statute's alleged purpose, and concluded that in practice the unfettered choice would actually be exercised to seek a tactical advantage. *See* A-16-20, and text accompanying footnote 12, *infra.*

D. The Lower Courts Acknowledged That Further Review Is Warranted

Following the entry of judgment the district court granted extraordinary relief and enjoined all Commission proceedings pending appeal. *See* A-21-22. In the Ninth Circuit the panel majority's ruling not only provoked a strongly-stated dissent but, at the request of an active judge, petitioners' suggestion for rehearing *en banc* was submitted for a vote of the active judges. *See* A-3. Again acknowledging that further review may be appropriate, the Ninth Circuit stayed the issuance of its mandate and thereby extended the district court's injunction pending this Court's final disposition of the case. *See* A-1.

REASONS FOR GRANTING THE WRIT

I

THIS CASE PROVIDES THE COURT WITH A UNIQUE OPPORTUNITY TO ADDRESS THE INHERENT SHORTCOMINGS IN TWO-TIER EQUAL PROTECTION ANALYSIS

The Ninth Circuit adhered to a two-tiered equal protection analysis in which it could choose only between levels of review

applying either strict scrutiny or a rational basis standard.[4] The panel majority concluded that, since "no suspect class is involved and no fundamental right is burdened," it was "obligated" to apply the latter. *See* A-7. With the issue thus reduced to an exercise for imagining some "conceivable" basis for the discrimination, no matter how attenuated, a judgment upholding the state's scheme inevitably followed.[5]

A. The Important Interests Affected By The Challenged Scheme Were Not Even Considered Under The Two-Tier Analysis Applied By The Ninth Circuit

As applied by the Ninth Circuit, conventional equal protection analysis offers no room to accommodate the vitally important interests and rights that are affected by the scheme challenged in these proceedings. Rigid adherence to the lowest order of equal protection review, for example, prevented the Ninth Circuit from giving due consideration to what this Court has consistently called the important and cherished right of equal access to courts and court procedures. *See Logan v. Zimmerman Brush Co.*, 455

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[4] These two standards of review, when literally applied, have been characterized as "tautological," inflexible and outcome-determinative. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 180 (1980); *Richardson v. Belcher*, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting). The strict scrutiny test has been described as "strict in theory and fatal in fact," while rational basis review has been called "minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

[5] Both the lower court and respondents have recognized that the statute at issue creates a classification between utility companies (*i.e.*, those brought before the Commission and those who proceed in a Superior Court). *See e.g., Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (classification may have been created "merely by the arbitrary decision of the state to seek . . . commitment under one statute rather than the other"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-39 (1982) (Blackburn, J., concurring) (classification based on timeliness *vel non* of agency's processing of claims).

U.S. 422 (1982); *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 223 (1967).

It surely requires more than a "conceivable" legislative purpose to sustain a state scheme giving the government itself, as a party litigant, the power selectively to deny its private party opponents access to a court, to trial by jury, and to appeal. This must emphatically be so in the context of an action securing an explicit constitutional right—just compensation—which the judiciary has otherwise enforced as a limitation on the power of the state.

This petition, therefore, presents the Court with an important opportunity to modify the inflexible, all-or-nothing two-tier equal protection analysis which "obligates" lower courts to characterize as "constitutionally insubstantial" salient procedural rights such as trial to a jury and to appeal, and which leaves the judiciary with no vehicle with which to assure neutral procedures for securing just compensation for private property taken by eminent domain.

1. Condemnees Are Arbitrarily Denied The Right To A Jury

Considering the overriding significance which has attached to jury trials in the jurisprudence of this Court, it is more than unfortunate that under conventional equal protection analysis that right can be characterized as "constitutionally insubstantial."[6] Fifty years ago, for example, the Court stated:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (citation omitted). *See also Batson v. Kentucky*, ___ U.S. ___, ___, 90 L.Ed.2d

[6] Under prior decisions of this Court, the seventh amendment does not provide a direct right to a jury trial in eminent domain proceedings. *United States v. Reynolds*, 397 U.S. 14 (1970). However, petitioners invoke the equally settled principle that even if a state is not *required* to provide a particular procedure (e.g., jury trial, appeal), if it is afforded, it must be given equally to all litigants. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Humphrey v. Cady*, 405 U.S. 504, 512 (1972).

69, 81 (1986) (petit jury has occupied "a central position in our system of justice"); *Jacob v. City of New York*, 315 U.S. 752, 753 (1942) ("right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts"); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340-56 (1979) (Rehnquist, J., dissenting); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47 (1977); H. Kalven and H. Zeisel, *The American Jury* (1966). The value to a litigant of a jury determination simply cannot be overestimated.[7]

It is therefore beyond dispute—even if it is beneath detection using rational basis review—that the unilateral power vested in the government here to deny identically-situated property owners a jury when litigating just compensation is an injustice of constitutional magnitude. Yet under conventional equal protection analysis, it is an injustice for which there is no redress.

2. Condemnees Are Arbitrarily Denied The Right To Appeal

By the same token, this Court has consistently recognized the importance of the right to an appeal. In this instance the constraints of conventional equal protection analysis again failed to provide protection commensurate with the interests affected. *See Evitts v. Lucey*, 469 U.S. 387, 404 (1985) (appeal a "vital right"); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969)

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[7] Jurors bring common sense and community values to the decision-making process. A jury's "very inexperience is an asset because it assures a fresh perception of each trial." H. Kalven and H. Zeisel, *The American Jury*, at 8; *see also Carlson v. Green*, 446 U.S. 14, 22-23 n.10 (1980) (deprivation of jury trial in Federal Tort Claims Act renders that remedy not as effective as *Bivens*-type action); *Ballew v. Georgia*, 435 U.S. 223, 238 (1978) (Court acknowledges research that judges and juries reach different conclusions in high percentage of cases); *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 537 (1958) (outcome of cases may be "substantially affected" by use of jury rather than judge); *Dower v. Boslow*, 539 F.2d 969, 972 (4th Cir. 1976) (jury trial preferable to administrative judge, even if substantially higher burden of proof required of adversary in administrative proceeding).

("exercise of a right of appeal must be free and unfettered"); *Griffin v. Illinois*, 351 U.S. 12 (1956) (free transcript on appeal necessary to equalize rights of appeal); *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150, 161 (1897) ("All litigants . . . should have the same right to appeal with others similarly situated"); ABA Comm. on Standards of Judicial Administration: Standards Relating to Appellate Courts § 3.10 commentary at 12 (right of appeal is "fundamental element of procedural fairness as generally understood in this country").

This Court has accorded great weight to appellate remedies by treating them as part of the critical right of access to the courts. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 25 n.4 (1974); *Mayer v. City of Chicago*, 401, U.S. 189, 193 (1971). In the context of a criminal case, moreover, the Court has even characterized it as "fundamental" that "avenues of appellate review . . . be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).

Yet in this case, even though petitioners' challenge is to procedures for securing the constitutionally required award for a taking of private property, rights to a jury and to an appeal were relegated by the Ninth Circuit to "rational basis" review and afforded negligible weight on the scales of equal protection. Any standard of review that leads to such a result is not worthy of this Court's continuing endorsement.

B. The Court's Precedents Acknowledge That To Sustain Distinctions Affecting Significant Interests Requires More Than A Conceivable Basis

This case presents a confluence of vitally important rights—of court access and just compensation—and is therefore a unique opportunity to expand upon the recent holdings of this Court which foreshadow a departure from the two-tier, outcome-determinative equal protection standards.

For example, in *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982), the Court stated that those statutory classifications affecting enduring concerns in the Constitution, but ones not rising to the

level of "fundamental" personal rights that would otherwise invoke strict scrutiny, must reflect "a reasoned judgment consistent with the ideal of equal protection [that] may fairly be viewed as furthering a substantial interest of the State" (footnote omitted).[8]

Just last Term, a majority of justices of the Court criticized the rigid application of two-tiered equal protection analysis. The majority concluded that judicial review must consider the interests affected by—and the neutrality of—a statutory classification. In *Cleburne v. Cleburne Living Center*, ___ U.S. ___, 87 L.Ed.2d 313 (1985), this Court held that mental retardation was not a "quasi-suspect" classification calling for a higher level of scrutiny under conventional two-tiered analysis.

In opinions in which a majority of the justices joined, however, this Court concluded that equal protection analysis must take into account the interests affected by the statute under review. 87 L.Ed.2d at 328 (Stevens J., joined by Burger, C.J., concurring) ("[T]he word 'rational' . . . includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially"); 87 L.Ed.2d at 331 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring) ("The formal label under which an equal protection claim is reviewed is less important than careful identification of the interests at stake and the extent to which society recognizes the

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[8] *See also Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73 (1972) ("when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny"); *Vlandis v. Kline*, 412 U.S. 441, 458-59 (1973) (White, J., concurring) (Court should apply " 'spectrum of standards' " in equal protection analysis, and as "weight and value of the individual interest escalates, the less likely it is that mere administrative convenience . . . will be sufficient to justify" irrational discrimination); L. Tribe, *American Constitutional Law* 1089-90 (1978) ("intermediate scrutiny has been triggered if important, though not necessarily 'fundamental' or 'preferred,' interests are at stake") (footnote omitted).

classification as an invidious one").[9] The boundaries of "rational" statutory classifications, therefore, are necessarily circumscribed by an evaluation that measures the benefits and burdens of the legislation and determines whether or not the statute is fair and neutral. *Cleburne, supra,* 87 L.Ed.2d at 328-29 (Stevens, J., concurring).[10]

This Court has acknowledged that the precise level of review and the manner in which it is to be accomplished remains unsettled. *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 176 n.10 (1980); *Schweiker v. Wilson,* 450 U.S. 221, 243 n.4 (1981) (Powell, J., dissenting).[11] The importance of

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[9] The Court has implicitly declined to apply the fatal "any conceivable basis" test to statutes affecting important interests. *Williams v. Vermont,* 472 U.S. ____, ____, 86 L.Ed.2d 11, 20 n.8 (1985) ("the choice of a proxy criterion . . . cannot be so casual as this, particularly when a more precise and direct classification is easily drawn"); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975) ("the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme") (footnote omitted); *Schweiker v. Wilson,* 450 U.S. 221, 244-45 (1981) (Powell, J., concurring) (if no legislative purpose appears "the Court should receive with some skepticism post hoc hypotheses" of government lawyers and should require a "fair and substantial relation" between the classification and the hypothesized purpose).

[10] In fashioning a constitutional rule that requires consideration of the interests affected by a statute, this Court need not write on a blank slate. In fact, this Court has for over a decade expressly weighed competing interests in analyzing whether a statutory scheme satisfies the requirement of procedural due process. *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976); *see also Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

[11] The inadequacies of the rigid, outcome-determinative, two-tier approach have also been chronicled in scholarly commentary. L. Tribe, *American Constitutional Law* 1089 (1978); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 17-18 (1972); Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe,* 1982 Sup. Ct. Rev. 167; Goodpaster, *The Constitution and Fundamental Rights,* 15 Ariz. L. Rev. 479 (1973).

equal protection review and the Court's unmistakable suggestion of impending change in these and other decisions has resulted and will continue to result in conflicting decisions by the lower courts. *Compare Diebler v. City of Rehoboth Beach*, 790 F.2d 328, 333-37 (3d Cir. 1986) and *Coburn v. Agustin*, 627 F.Supp. 983 (D.Kan. 1985) with *Hoffman v. United States*, 767 F.2d 1431, 1435-36 (9th Cir. 1985) and *Frazier v. Heebe*, 788 F.2d 1049, 1053 (5th Cir. 1986). Accordingly, this is an important case uniquely warranting review by this Court.

C. The Ninth Circuit's Decision Results From An Inadequate Standard Of Review

The unfortunate implications of two-tier equal protection analysis and rational-basis decision-making are manifest from the result below. The Ninth Circuit felt constrained by the limitations of that test to uphold a statute which on its face empowers the government condemnor, when litigating the constitutional right to just compensation, selectively to deprive some but not all property owners of a jury trial and appeal. The scheme survives under that test even though the advantage it confers can be invoked arbitrarily and without reference to standards of any kind by the very party—the government—whose power the fifth amendment was intended to curtail.

In order to apply the rational basis standard, the Ninth Circuit majority obediently undertook a metaphysical search for some alleged "conceivable" purpose. The majority's efforts concluded with the hypothesis that the California legislature had conceivably concluded that "cities would be in the best position to choose the appropriate forum." *See* A-12. The panel majority reasoned, moreover, that even though the statute did not provide criteria to govern this arbitrary choice, and even though the "rational" exercise of that choice is delegated to municipalities, "presumably, the legislature believed that the City would exercise its discretion in an appropriate manner." *See* A-12. Such post hoc conceptualization virtually assures affirmance for the legislation under review; it is, therefore, no review at all.

The justification contrived in this case, for example, that one litigant will exercise its unfettered forum choice in a neutral

manner may be "conceivable" (very little is not), but it is supremely unrealistic.[12] As Judge Pregerson correctly observed in dissent below,

> In each case, a city will choose the forum that will produce the best result for it. If a city believes that in a particular case a jury trial will result in a lower compensation award, it will choose to proceed in a state trial court; if not, it will go to the P.U.C.

See A-20 (footnote omitted).

That the Ninth Circuit majority felt compelled to sustain the scheme in question under two-tier analysis illustrates eloquently the need for this Court to address the shortcomings of that "test."

II

DISCRIMINATORY PROCEDURES FOR AWARDING JUST COMPENSATION AFFECT MORE THAN MERE ECONOMIC INTERESTS AND REQUIRE MORE THAN PERFUNCTORY REVIEW

The right to just compensation is one which this court has long recognized as a cherished, fundamental right. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 160 (1980); *Duncan v. Louisiana,* 391 U.S. 145, 149 n. 14 (1968). A judicial proceeding to determine just compensation is expressly required by the United States Constitution. U.S. Const., amend. V; *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327-28 (1893).

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[12] The lower court's notion that the condemnor's unfettered choice will conceivably result in a channeling of complex valuations to the Commission is belied by the facts of this very case. Jackson Water Works, Inc., is a water company serving a small community with a population of approximately 3,000. Accordingly, this may be among the least "complicated" valuation cases. That it ended up before the Commission highlights the arbitrariness of the forum choice.

The City virtually conceded that it exercised its option in a tactical manner when it asserted the attorney-client privilege in response to an interrogatory asking it to state its reasons for electing to proceed before the Commission.

Despite the pivotal signifcance of these rights in our society,[13] under conventional equal protection analysis the Ninth Circuit found them susceptible to characterization as mere "economic" interests, and accordingly they were left unprotected. Equal protection, however, should represent an important limitation on the government's power to take by foreclosing unilateral advantages devised for itself in procedures the state enacts for fixing just compensation.

A. Rational Basis Review Of Discriminatory Procedures For Fixing Just Compensation Places The State's Power To Take Beyond Judicial Constraint

This Court should establish, therefore, a vigilant role for the judiciary through the equal protection clause in assuring the legislature's compliance with the requirements of just compensation. Such a role constitutes an essential complement to the decisions of this Court commanding the judiciary to give maximum deference to the legislature when the legislature finds that a condemnation serves a "public use" and thus claims to have satisfied the only other condition on its power to take.

The Court's decisions establish unmistakably that the role remaining for the judiciary in reviewing the legislature's claim of "public use" is "extremely narrow." *Berman v. Parker*, 348 U.S. 26, 32 (1954). The test to be applied by the courts in fulfilling

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[13] This Court has often underscored the significance of these interests. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) ("Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole"); *see also Penn Central Transportation Co. v. New York*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting) (just compensation clause intended to prevent government from invading private rights); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327-28 (1893) ("right of the legislature . . . to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case . . . *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution") (emphasis added).

that narrow role is, significantly, the same rational basis test just employed by the Ninth Circuit, *i.e.*, whether "the exercise of the eminent domain power is rationally related to a conceivable public purpose. . . ." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). If both the "public use" limitation on the power to take and the procedures for fixing the amount of just compensation on which that power is conditioned are subject only to minimal review, then the Court will have effectively placed the power of eminent domain beyond judicial supervision.

B. Judicial Deference To The Power To Take Must Be Accompanied By Judicial Scrutiny Of Procedures Which Purport To Yield Just Compensation

The Court, however, has taken care to emphasize that the sweeping latitude it affords to legislatures to invoke the power to take and to determine what is a public use is predicated on the payment of just compensation. *See, e.g., Midkiff, supra*, 467 U.S. at 245 (O'Connor, J.) ("[W]e assume . . . that the weighty demand of just compensation has been met . . ."). Since this Court broadly construes the government's extraordinary power to take as extending to any "conceivable" legislative purpose, then countervailing rigor is plainly needed whenever the judiciary reviews the procedure by which the sole remaining condition to that power—the payment of just compensation—is purportedly satisfied.

Neutral procedures afforded all parties in fixing the amount of just compensation, therefore, provide above all the protection under our system for property subject to the government's power to take. This Court should grant review to confirm that an evenhanded *procedure*, vigilantly enforced by the judiciary through the equal protection clause and free of governmental self-dealing, is the source of the justice underlying "just" compensation.[14]

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[14] Consideration of the strong societal interest in fair procedures for determining just compensation is especially appropriate since here one litigant loses a jury trial. For this Court has stated that "the purpose of the jury trial in . . . civil cases [is] to assure a fair and equitable

III

THE JUDICIARY MUST NOT DEFER TO "CONCEIVABLE" JUSTIFICATIONS FOR DISCRIMINATORY LEGISLATION AFFECTING JUDICIAL REMEDIES

The Ninth Circuit felt constrained to hold under conventional equal protection analysis that even governmental self-dealing in allocating procedural advantages cannot be redressed under the equal protection clause, even if the procedures, such as jury trial and appeal, are substantively significant, and even if the litigation is addressed to issues of constitutional stature. There should be no resort, however, to stratified degrees of review when the judiciary passes upon legislation that purports to prescribe judicial procedures. The Court should grant review to establish that the legislature cannot broker judicial procedures to confer on only one party a unilateral advantage, much less may it do so in the state's self-interest.

A. Procedural Rights Are Judicial Guarantees, Not Legislative Distinctions

Traditionally, and properly, courts have given state legislatures wide latitude in the regulation of their local economies and social welfare. *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). This deference is predicated on the theory that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of *legislative* policy determinations." 427 U.S. at 303 (emphasis added).

Whatever deference or immunity might be warranted for classifications drawn on substantive economic or social grounds, it is the judiciary's proper role to intervene when a state legislature discriminates in disbursing *procedural* guarantees, particularly when it does so in favor of the state itself. Not surprisingly, the decisions of this Court give substantially less deference to legislative classifications that affect judicial procedures.

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resolution of factual issues." *Colgrove v. Battin,* 413 U.S. 149, 157 (1973) (citation omitted).

Justice Harlan, in his concurrence in *In re Gault,* 387 U.S. 1 (1967), described the Court's more active role in reviewing statutes that affect procedural rights:

> This principle [wide deference to legislative judgments] does not, however, reach all the questions essential to the resolution of this case. The legislative judgments at issue here embrace assessments of the necessity and wisdom of procedural guarantees; these are questions which the Constitution has entrusted at least in part to courts, and upon which courts have been understood to possess particular competence.

398 U.S. at 70 (Harlan, J., concurring in part, dissenting in part).

B. The Court's Precedents Require That Significant Judicial Procedures Be Free Of Arbitrary Distinctions

This court has, without acknowledging it expressly, adhered to the wisdom expressed in Justice Harlan's conclusion. In *Lindsey v. Normet,* 405 U.S. 56 (1972), for example, this court rigorously examined a statutory restriction on appeals and was unwilling to accept several proffered justifications, even though they might technically have formed a conceivable basis for the legislation. Similarly, in *Humphrey v. Cady,* 405 U.S. 504 (1972), this Court closely scrutinized a restriction on access to a jury trial, even though in that case trial by jury was not constitutionally mandated. The Court refused to accept the "conceivable" rationale that the prosecutor would fairly distribute this right.

In *American Motorists Insurance Co. v. Starnes,* 425 U.S. 637 (1976), this Court made it clear that if a procedure is significant to the result, but applies unequally, the statute violates the equal protection clause. In *Starnes,* this Court strongly implied that if one class of litigants was required to make a meaningful prima facie showing to satisfy venue requirements, while a similarly-situated class of litigants was not, the procedural scheme would violate equal protection under any standard of review. 425 U.S. at 642-45; *see also* 425 U.S. at 648 (Burger, C.J., concurring).[15]

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[15] These same considerations led this Court to conclude that the right to a jury trial is in effect to be treated as "substantive" and thus

This Court's decisions, therefore, adhere to the principle that, when procedures are afforded unevenly, particularly procedures of such significance as jury trial or an appeal, legislatures will not enjoy the constitutional leeway accorded in other contexts. Different "tiers" of analysis need not be invoked. In short, the sufficiency and constitutionality of judicial procedures is an issue that deserves judicial, not legislative, resolution.[16]

C. Review Of This Case Would Address Questions Of Timely Importance

This very case, involving as it does issues of constitutional dimension relegated unequally to administrative resolution, raises questions that deserve elaboration in light of the Ninth Circuit's opinion and the proliferation of state administrative remedies created in response to various "crises" (*i.e.*, court congestion, medical malpractice). Specifically, this Court has yet to rule that, in creating procedural remedies, legislatures must not favor only

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guaranteed under the *Erie* doctrine. *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525 (1958). Requiring equality in treatment as to procedural rights which are "substantive" for *Erie* purposes might be a workable test for determining which kinds of "procedures" must be afforded equally.

[16] Time-honored decisions of this Court have implicitly recognized this distinction by invalidating state procedural schemes on equal protection grounds. *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927) (foreign corporations alone subject to suit in all state venues); *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923) (onerous discovery requirements imposed on only one class of litigants); *Atchison, Topeka & Santa Fe Railway Co. v. Vosburg*, 238 U.S. 56 (1915) (discrimination in eligibility for attorney's fees). Some lower courts have adhered to this implicit principle, while others have felt constrained under the two-tiered approach to give complete deference to state legislatures. Compare *Miller v. Jordan*, 472 P.2d 841 (Oregon 1970) (state statute providing for advance jury fees in some cases but not others denies equal protection), and *Kansas City v. Webb*, 484 S.W.2d 817 (Missouri 1972) (en banc), *cert. denied*, 409 U.S. 851 (1972) (city charter granting only corporate condemnee the option of a six- or twelve-person jury violates equal protection), with *Chrysler Corp. v. Texas Motor Vehicle Com'n*, 755 F.2d 1192, 1201 (5th Cir. 1985) (plaintiff given sole access to de novo action in district court).

one of the parties with a choice of forum, or that the equal protection clause requires equal access for equally situated litigants to administrative agencies or, as in this case, to the courts.

The facts of this case, however, are especially compelling: even though the proceedings in question are convened to vindicate a citizen's fundamental constitutional right (*Webb's Fabulous Pharmacies v. Beckwith, supra,* 449 U.S. at 160), the legislature has conferred the advantage here on the government itself. The Court should grant review to establish that deference to the legislature implemented through varying "levels" of scrutiny is inappropriate where it enacts substantive procedures controlling significant interests for the state's unilateral advantage.[17]

IV

THE NINTH CIRCUIT'S ASSUMPTION THAT THE RIGHTS TO A JURY TRIAL AND TO AN APPEAL ARE CONSTITUTIONALLY INSUBSTANTIAL IS IN DIRECT CONFLICT WITH PRECEDENTS OF THIS COURT

The Ninth Circuit assumed that depriving one class of litigants of a jury trial and an appeal affects rights which, for purposes of equal protection analysis, are "constitutionally insubstantial." *See* A-10. This conclusion flatly contradicts at least two equal protection holdings of this Court.

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[17] The Court has already agreed to review a case that focuses also upon the constitutionality of a statutory scheme that allegedly discriminates between litigants with regard to appellate rights. *Burlington Northern R.R. Co. v. Woods,* No. 85-1088, *cert. granted,* Mar. 24, 1986. That case raises an equal protection challenge to a state statute that imposes a penalty on defendants unsuccessful on appeal but no corresponding penalty on unsuccessful plaintiffs. If the Court strikes down the statute in *Burlington Northern*, that disposition would seem to compel reversal in this case. It is important to note, however, that the scheme challenged here contains greater inequalities affecting more and different rights than the statute in *Burlington Northern*; accordingly, a decision upholding the *Burlington Northern* statute by no means compels or even suggests affirmance in this case.

This Court has consistently held that appellate rights are significant procedures for purposes of equal protection analysis. *Lindsey v. Normet*, 405 U.S. 56 (1972); *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966); *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150, 153 (1897). In *Lindsey*, for example, the Court held unanimously in an opinion written by Justice White that while there was no general constitutional right to an appeal,

> [W]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.

405 U.S. at 77 (citations omitted).

Similarly, the Court struck down on equal protection grounds a statute affecting the availability of trial by jury. *See Humphrey v. Cady*, 405 U.S. 504 (1972). In *Humphrey*, another unanimous decision, this Court held that a state could not, consistent with equal protection, arbitrarily grant one set of defendants a jury trial while denying that right to other, similarly situated defendants. 405 U.S. at 512.

The lower court acknowledged that the holdings in *Lindsey* and *Humphrey* "offer JWW substantial support for its position." *See* A-12. However, the lower court then remarkably and erroneously rejected them as inapposite. The lower court's failure to distinguish those holdings is fully and convincingly discussed in the dissenting opinion of Judge Pregerson below. *See* A-18 through A-20. That the lower court committed this error at the expense of trial by jury, the right of appeal, and procedural fairness when the government exercises the constitutionally limited power to take, makes this case an important occasion for review by this Court.

CONCLUSION

The lower court's conclusion that the government as a litigant can unilaterally confer or withhold a private party's rights to a jury and to an appeal, even in a proceeding required by the Constitution, deserves to be repudiated. This Court should grant review to reexamine the equal protection standards under which this conclusion was reached.

Review by this Court is especially warranted if the Court strikes down the statute challenged in *Burlington Northern R.R. Co. v. Woods*. *See* footnote 17, *supra*.

This Court should declare that the right to exercise or deny pivotal procedural advantages, and the power to allow or foreclose access to the courts, cannot be conferred by the legislature on one party exclusively, particularly where that party is the government itself as the adversary of its constituents in litigation of constitutional issues.

DATED: November 26, 1986

Respectfully submitted,

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86-893

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JACKSON WATER WORKS, INC., and
CITIZENS UTILITIES COMPANY,
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, et al.,
Respondents.

APPENDIX

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Amended Order on Motion for Stay of Mandate of the United States Court of Appeals for the Ninth Circuit, Filed October 29, 1986.

United States Court of Appeals
For the Ninth Circuit

No. 85-1667
CV 84-3439 TEH

Jackson Water Works, Inc.,
a California Corporation and
Citizens Utilities Company
a Delaware Corporation,
Plaintiffs-Appellants,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants-Appellees.

[Filed Oct. 29, 1986]

AMENDED

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of appellants motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before November 26, 1986.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby GRANTED.*

/s/ OTTO SKOPIL
United States Circuit Judge
Otto R. Skopil

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* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

Order on Motion for Stay of Mandate of the United States Court of Appeals for the Ninth Circuit, Filed October 28, 1986.

United States Court of Appeals
For the Ninth Circuit

No. 85-1667
CV 84-3439 TEH

Jackson Water Works, Inc.,
a California Corporation and
Citizens Utilities Company
a Delaware Corporation,
Plaintiffs-Appellants,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants-Appellees.

[Filed Oct. 28, 1986]

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of appellants motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before November 16, 1986.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby GRANTED.*

/s/ OTTO SKOPIL
United States Circuit Judge
Otto R. Skopil

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* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

Order of the United States Court of Appeals for the Ninth Circuit, Filed October 16, 1986.

United States Court of Appeals
For the Ninth Circuit

No. 85-1667
DC No. CV 84-3439 TEH

Jackson Water Works, Inc.,
a California Corporation and
Citizens Utilities Company
a Delaware Corporation,
Plaintiffs-Appellants,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants-Appellees.

ORDER

[Filed Oct. 16, 1986]

Before: SKOPIL, PREGERSON, and WIGGINS, Circuit Judges

A majority of the panel votes to deny the petition for rehearing. An active judge called for a vote on the suggestion for rehearing en banc. A majority of active judges voted to reject that suggestion. The petition for rehearing and suggestion for rehearing en banc are DENIED.

Opinion of the United States Court of Appeals for the Ninth Circuit, Filed October 11, 1986.

To Be Published

United States Court of Appeals
For the Ninth Circuit

No. 85-1667
DC No. CV 84-3439 TEH

Jackson Water Works, Inc.,
a California Corporation, and
Citizens Utilities Company,
a Delaware Corporation,
Plaintiffs-Appellants,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants-Appellees.

OPINION

[Filed July 8, 1986]

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted October 11, 1985
San Francisco, California

Before: SKOPIL, PREGERSON, and WIGGINS, Circuit Judges

SKOPIL, Circuit Judge:

This is a challenge by a private utility to the constitutionality of a state statutory scheme which allows public condemnors the choice of adjudicating just compensation in either state court or before the Public Utility Commission. We agree with the district court that the statutes do not facially violate either equal protection or due process. We affirm.

FACTS AND PROCEEDINGS BELOW

Plaintiff-appellant Jackson Water Works ("JWW") is an investor-owned public utility water system serving customers in and around Jackson, California. Plaintiff-appellant Citizens Utilities Company is JWW's sole shareholder. Defendant-appellees are the City of Jackson and its various officers ("City") and the California Public Utility Commission and its members ("PUC").

On April 10, 1984 the City, acting pursuant to Cal. Pub. Util. Code §§ 1403-04 (West 1975), declared its intention to acquire JWW through eminent domain by filing a petition with the PUC. The petition sought a determination by the PUC of the amount of just compensation to be paid by the City. Before such a determination could be made, JWW filed this action in federal district court seeking declaratory and injunctive relief. JWW contended that the administrative procedure offends equal protection because similarly situated utilities are subjected to just compensation determination at the City's option in either state court or before the PUC. JWW further alleged that adjudication of just compensation by the PUC violates due process because it denies an impartial tribunal and meaningful appellate review.

On cross-motions for summary judgment the district court granted the City's motion. JWW timely appealed. Thereafter, the district court granted JWW's motion for an injunction pending appeal that has prevented the PUC from proceeding with the just compensation determination.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir.), *appeal dismissed and cert. denied*, 106 S. Ct. 241 (1985). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). There are no disputed facts in this case. Resolution therefore depends upon *de novo* examination of questions of law. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984). The district court's interpretation

and application of state law is entitled to no special deference; questions of state law are reviewed *de novo*. *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc).

DISCUSSION

A. Equal Protection

The equal protection clause of the fourteenth amendment commands that no state shall deny any person the equal protection of the laws. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3254 (1985). This requires that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

JWW complains that equal protection is violated by arbitrary discrimination between identically situated public utility condemnees. The alleged discrimination is the result of a statutory condemnation scheme which allows a city condemnor to unilaterally select the forum for the adjudication of just compensation. Significant procedural differences between the forums, JWW argues, give rise to the equal protection violation.

1. Statutory Scheme

A California political subdivision which seeks to exercise its powers of eminent domain to acquire property must institute and conduct an action in the California Superior Court. Cal. Civ. Proc. Code §§ 1230.010-070 (West 1982). Both condemnor and condemnee have the right to a jury determination of just compensation. Cal. Const. art. I, § 19. The condemnee may seek review of the court's determination by an absolute right of appeal to the California Court of Appeals. Cal. Const. art. VI, § 11; Cal. Civ. Proc. Code § 904.1. A discretionary writ of review may be made to the California Supreme Court. Cal. Rules of Court, Rule 28.

When the condemnee is a public utility, the political subdivision may elect the procedures provided by the California Public Utility Code. Cal. Pub. Util. Code §§ 1401-21. That statute provides that upon petition by the City, the PUC, acting in its judicial capacity, will conduct proceedings to determine just

compensation. *Id.* at § 1411. The administrative procedure is commenced at the City's option. It is an "alternative and cumulative and not exclusive" procedure for the determination of just compensation. *Id.* at § 1421. There are no juries. Review is by application for rehearing to the Commission and by writ of review to the California Supreme Court. *Id.* at § 1420.

If the utility refuses to accept the compensation, the City is required to obtain an order of condemnation by commencing an action in Superior Court. *Id.* at § 1413. In such court proceedings the finding of the Commission fixing compensation are "final and shall not be subject to modification, alteration, reversal or review." *Id.* at § 1416.

2. Level of Review

In determining whether the statutory scheme violates equal protection, we must first determine the level of scrutiny to apply. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973). JWW argues we must apply strict scrutiny because the state's classifications impinges upon fundamental rights. The City contends that the district court correctly applied a rational basis standard.

Traditionally, these two standards, strict scrutiny and rational basis, have been applied when state action is challenged on equal protection grounds. *Hoffman v. United States*, 767 F.2d 1431, 1434 (9th Cir. 1985). Strict scrutiny is applied when the state's classification is deemed to be made on "suspect" grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association. *Id.* at 1434-35.[1] When no suspect class is involved and no fundamental right is burdened, we are obligated to apply a rational basis test to determine the legitimacy of the

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[1] An intermediate level of scrutiny has been applied to gender-based classifications and categorizations involving legitimacy. *Hoffman*, 767 F.2d at 1435; *see also Jones v. Reagan*, 748 F.2d 1331, 1337 (9th Cir. 1984) (describing intermediate level as "heightened" review), *cert. denied*, 105 S. Ct. 3505 (1985).

state's classifications. *Olagues v. Russoniello*, 770 F.2d 791, 802 (9th Cir. 1985).

JWW contends that the classification here impinges on its rights to just compensation, a right expressly protected by the fifth amendment. Such a right has not been deemed "fundamental" for purposes of applying strict scrutiny in an equal protection analysis. More important, as the district court reasoned, JWW does not contend that it is denied just compensation, but only complains of the process. Deficiencies in that process such as lack of a jury trial and limited appeal rights, JWW contends, call for at least heightened scrutiny. But while these alleged deficiencies may give rise to equal protection arguments, *i.e., Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (right of appeal); *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (jury), neither has been accorded heightened review. *See Hoffman*, 767 F.2d at 1435 (noting that intermediate review has been limited to gender and legitimacy classifications).

We conclude that the district court properly chose to apply the rational basis standard. Where a regulation or statute affects only economic and not fundamental interests, the state is free to create any classification scheme that does not invidiously discriminate. *Burlington Northern Railroad Co. v. Department of Public Service Regulation*, 763 F.2d 1106, 1113 (9th Cir. 1985). The proper test for judging the constitutionality of statutes regulating economic activity challenged on equal protection grounds is whether the legislation bears a rational relationship to a legitimate state interest. *Id.* at 1109; *Jones v. Reagan*, 748 F.2d 1331, 1337 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3505 (1985). "Because the classification at issue does not interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the proper standard for review is the rational basis test. . . ." *In re Lara*, 731 F.2d 1455, 1460 (9th Cir. 1984).

3. Rationality of the Statutory Scheme

Application of the rational basis standard requires a two-step analysis. *Hoffman*, 767 F.2d at 1436 (citing *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 668 (1981)). First, we must determine whether the challenged

legislation has a legitimate purpose. *Id.* Second, assuming a legitimate purpose, we must decide whether the challenged classification promotes that purpose. *Id.* at 1436-37. There need not be a "tight fitting relationship" between the legislative goal and the result. *Id.* at 1437 n.7. All that is needed to uphold the state's classification scheme is to find that there are "plausible," "arguable," or "conceivable" reasons which may have been the basis for the distinction. *Brandwein v. California Board of Osteopathic Examiners,* 708 F.2d 1466, 1472 (9th Cir. 1983) (citations omitted). "Whether these reasons in fact underlay the legislative action is 'constitutionally irrelevant.' " *Id.* (quoting *Flemming v. Nestor,* 363 U.S. 603, 612 (1960)). The moving party carries the burden of proving unconstitutionality under a rationality review because statutes are presumed to be constitutional. *Burlington Northern,* 763 F.2d at 1109; *see also Jones,* 748 F.2d at 1338 (legislation is presumed to be rational).

The California Supreme Court in reviewing the administrative option here concluded that when a city elects to petition the agency to determine just compensation "it simply avails itself of the privileges thereby granted to bring into operation the facilities, expert and technical, which the Commission has on hand in connection with the exercise of its regulatory powers." *East Bay Municipal Utility District v. Railroad Commission of California,* 194 Cal. 603, 229 P. 949, 951 (1924) (referring to PUC's predecessor agency, the Railroad Commission). It appears that the California legislature, in creating the dual forum system, expected that the particular expertise of the PUC would further the interests of justice and economy in some instances but not in others. Presumably, the larger, more complex adjudications would be handled by the PUC. *See Marin Municipal Water District v. Marin Water and Power Co.,* 178 Cal. 308, 173 P. 469, 472 (1918) ("fact that public utilities are subject to constant regulation and examination by the [commission] may well have led the Legislature to conclude that that commission was best able to make a just and equitable appraisement of their property"). JWW apparently does not dispute that the legislature could reasonably have concluded that the PUC's expertise is needed for just compensation determinations in all utility condemnations.

See Marin Municipal Water District, 173 P. at 472 (upholding the utility and non-utility distinction against equal protection attack).

The district court, in rejecting JWW's equal protection claim, relied primarily on the conclusion that the procedural differences in the forums are insufficient to give rise to an ascertainable injury. Assuming that the differences in forums are constitutionally insubstantial, there is ample decisional support for the district court's conclusion. In *American Party of Texas v. White,* 415 U.S. 767, 781 (1974), the Court reasoned that an appellant claiming an equal protection violation bears the burden of demonstrating discrimination "of some substance." The burden is not met by mere assertions that differences exist. A state is not guilty of invidious discrimination in "recognizing these differences and providing different routes." *Id.* at 782 n.13. Similarly, in *American Motorists Insurance Co. v. Starnes,* 425 U.S. 637, 644-45 (1976), the Court reasoned:

> [I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.

(quoting *Cincinnati Street R.R. Co. v. Sneel,* 193 U.S. 30, 36-37 (1904)).

Nevertheless, there is an argument that the procedural differences are not constitutionally insubstantial. JWW contends that the two forums do not apply the same substantive law because the Commission systematically relies on a methodology of valuation that tends to understate true valuation. The PUC has rejected, however, the possibility that it is entitled to utilize a different method of valuation than mandated by law. *See East Yolo*

Community Services District, 1 Cal. PUC 2d 474, 476-77 (1979) (noting Commission's adoption of method of valuation set by decisional law and later codified at Cal. Civ. Proc. Code § 1263.320). Moreover, in *Community Redevelopment Agency v. Abrahams,* 15 Cal. 3d 813, 543 P.2d 905, 126 Cal. Rptr. 473, 478 (1975), the California Supreme Court stated:

> The fact that the law provides two distinct methods for governmental acquisition of public utilities—proceedings before the commission . . . and judicial eminent domain proceedings . . . —does not, as defendant suggests, "create serious equal protection problems" due to differing substantive measures of recovery according to the method chosen. [I]t was the clear intent of the Legislature to create alternative methods of *procedure,* and that procedure authorized by the Public Utilities Code should not be held to be exclusive of the judicial method . . . . It is manifest that the measure of compensation vouchsafed a public utility by the Public Utility Code . . . is also to be accorded it in proceedings under the Code of Civil Procedure.

Id., 543 P.2d at 910-11 n.6 (citations omitted; quotes and emphasis in original).

JWW argues that the consequences of the City's unilateral forum decision is more than procedural because the City's choice of the agency eliminates the right to a jury and intermediate appellate review. In *Lindsey v. Normet,* 405 U.S. at 79, the Supreme Court struck down an Oregon statute that required a double-bond from a certain class of appellants. The Court reasoned that when an appeal is afforded, it cannot be granted to some litigants and capriciously and arbitrarily denied to others. *Id.* at 77. The Court found the requirement to be arbitrary because it did not satisfy any legitimate state purpose. *Id.* at 77-79.

In *Humphrey v. Cady,* 405 U.S. at 507-11, the Supreme Court examined petitioner's contention that institutionalization under the state's Sex Crimes Act is essentially equivalent to commitment for compulsory treatment under the state's Mental Health Act. Petitioner argued that since the latter provided for a trial by jury, his commitment under the former without a right to a jury

determination violated equal protection. The Court concluded that the claim merited remand for an evidentiary hearing since the equal protection claim appears "especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the others." *Id.* at 512.

Language in these cases offer JWW substantial support for its position. Nevertheless, they do not necessarily direct a conclusion that the legislative scheme here violates equal protection. First, the state is not obligated under the federal Constitution to provide either a right of appeal or a jury trial. *See Lindsey*, 405 U.S. at 77 (if a full and fair trial on merits is provided, state need not provide appellate review); *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (seventh amendment not applicable to the states). Second, the Supreme Court has recognized that the creation of administrative remedies may properly eliminate rights that may have been available in the judicial forum. For example, in *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 460 (1977), the Court concluded that the seventh amendment did not prevent Congress from creating rights and remedies by statute, committing their enforcement to a tribunal other than a court, and thereby eliminating factfinding by a jury. The seventh amendment is no bar to the enforcement of new rights in a speedy and expert tribunal. *Id.* at 461.

Most important, it is conceivable that the legislature rationally believed that cities would be in the best position to choose the appropriate forum. Although the legislature did not express criteria to govern the City's choice, this does mean that the City selects the forum for the specific purpose of depriving the utility of a jury or review by the state court of appeals. The selection of the administrative forum also deprives the City of a jury determination and intermediate review. Presumably, the legislature believed that the City would exercise its discretion in an appropriate manner. We agree with the district court that the legislature could have rationally concluded that the public's interest would be better served by allowing the City to select the forum. As the

district court noted, "[w]hile the utility may only consider the narrow interests of its private investors, the municipality is responsible to the public interest in general."[2]

We conclude that the legislation has a legitimate purpose and that the challenged classification reasonably supports that purpose. The forum selection results in no ascertainable injury since the same substantive law is applied. Further, the legislative decision to vest discretion in the public condemnor is a rational method of achieving the legislative purpose of directing a certain class of utility condemnation compensation decisions to the PUC. The state's decision does not have to be perfect; there need only be plausible or conceivable reasons which may have been the basis for the distinction. *Brandwein,* 708 F.2d at 1472. "Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds

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[2] The district court also relied in part on the general practice of allowing the prosecuting party the discretion to proceed in alternative forums. The court examined *Georgia Power Co. v. 54.20 Acres of Land,* 563 F.2d 1178 (5th Cir. 1977), *cert. denied,* 440 U.S. 907 (1979), *rev'd in part on other grounds, Georgia Power Co. v. Sanders,* 617 F.2d 1112 (5th Cir. 1980) (en banc), *cert. denied,* 450 U.S. 936 (1981). There the court reviewed a federal statute that permitted a utility licensee to exercise the power of eminent domain in either federal or state court. In dictum, the court stated that it found no equal protection violation by the plaintiffs choosing "between two or more causes of action with different consequences for defendants." *Id.* at 1193; *see also Sanders,* 617 F.2d at 1122, n.15 (no merit to argument that impermissible forum shopping and denial of equal protection may result from application of different standards of compensation when a licensee has the option of proceeding under state or federal powers of eminent domain).

The district court's analogy is not perfect. The choice of actions created by the federal statute was between state court and federal court. JWW concedes that the equal protection clause does not apply when the dissimilar treatment involved is the result of differences between the laws not of one state, but of different sovereignties. A state's creation of alternative forums may cause constitutional problems if arbitrary selection deprives a litigant of significant procedural protections. *See Humphrey,* 405 U.S. at 512.

can be conceived to justify them." *Clements v. Fashing,* 457 U.S. 957, 963 (1982).

B. Due Process

The due process clause guarantees an aggrieved party the opportunity to present a case and have its merits fairly judged. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982). "[*S*]*ome* form of hearing" is required before a person is deprived of a protected property interest. *Id.* (quoting *Board of Regents v. Roth,* 408 U.S. 564, 570-71 n.8 (1972) (emphasis in original). JWW contends that just compensation determinations by the PUC violate procedural due process because (1) the Commission is biased in its reliance on an unfair valuation methodology; (2) the Commission unlawfully combines its legislative and judicial functions; and (3) there is no meaningful appellate review.

1. Bias

Every party is entitled to an impartial tribunal. *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980). JWW argues that the PUC is predisposed to using an original cost valuation method which tends to understate the true value of the utility. But, as we noted above, the PUC has adopted and applies the same valuation method used in Superior Court condemnation proceedings. *See East Yolo Community,* 1 Cal. PUC 2d at 476-77. There is no bias in favor of a methodology other than the methodology required by law.

2. Judicial Capacity

JWW complains that the PUC acts in both a legislative capacity (rate setting) and a judicial capacity (just compensation). This dual capacity has been expressly upheld by the California Supreme Court. In *Marin Municipal Water District,* 173 P. at 472, the court acknowledged that fixing the amount payable as just compensation is a judicial question and that due process would be lacking if the state took property without a judicial determination of just compensation. Nevertheless, the court concluded that in a prior decision, *Marin Water and Power Co. v. Railroad Commission,* 171 Cal. 706, 154 P. 864 (1916), it was settled that the Commission's authority to fix just compensa-

tion for utility property taken by eminent domains was derived from Art. 12, § 5 of the California Constitution as a judicial power. *Marin Municipal Water District,* 173 P. at 472. Thus, the Commission is empowered by the state constitution to act in both capacities.

3. Appellate Review

JWW complains that Cal. Pub. Util. Code § 1416's limitation of review is a denial of due process. When a full and fair adjudication on the merits is provided, due process does not require a state to provide appellate review. *Lindsey,* 405 U.S. at 77. Further, we conclude that the review provided is sufficient to meet the requirements of procedural due process. While discretionary writs of review to the California Supreme Court are rarely granted, the denial of a writ of review by that court, even without opinion, is a decision on the merits entitled to res judicata effect. *See Pacific Telephone & Telegraph Co. v. Public Utilities Commission,* 600 F.2d 1309, 1316 (9th Cir.), *cert. denied,* 444 U.S. 920 (1979). Additionally, the PUC adjudicates only how much compensation is justly owed to the utility. All other condemnation proceedings are reserved for the Superior Court with full intermediate appellate review. Cal. Civ. Proc. Code §§ 1230.050; 904.1.

We acknowledge that review by discretionary writ may not provide all the advantages of review by the court of appeals. Nevertheless, the fact that the state need not provide any appellate review and that the review that is provided is on the merits is sufficient to uphold section 1416 against a due process attack.

CONCLUSION

Utility condemnees are not denied equal protection by a legislative scheme that permits the public condemnors the unilateral choice of adjudicating just compensation in either state court or before the PUC. The adjudicatory process before the PUC does not violate the utility's right to procedural due process.

AFFIRMED.

Jackson Water Works, Inc., a California corporation, and Citizens Utilities Company, a Delaware corporation v. The Public Utilities Commission of the State of California, et al., No. 85-1667

PREGERSON, Circuit Judge, dissenting

In approaching this case, it is instructive to examine the following situation. A California city seeks to condemn property owned by two similarly-situated public utilities. The city institutes condemnation proceedings against the first utility in California state trial court, where that utility has a right to a jury trial and an absolute right to appeal the trial court's decision to the California Court of Appeal. The city takes the other utility through compensation proceedings before the Public Utilities Commission, where that utility has no right to a jury trial and may seek only limited review of the PUC's compensation decision through a rarely-granted discretionary writ to the California Supreme Court.[1] The city's choice of forum is completely unilateral and unfettered; the utility/condemnee has no right to alter the city's decision. I believe that such a statutory scheme, which allows identically-situated utility/condemnees to be subject to fundamentally different treatment at the whim of a California political subdivision, violates the equal protection clause of the federal constitution.[2] I therefore dissent.

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[1] The actual operation of the administrative system involved in this case belies any notion that review of condemnation proceedings by discretionary writ is meaningful. It appears that in the seventy year history of this scheme, the California Supreme Court has never reversed a compensation decision of the PUC. In fact, it has granted review in only three cases, and has not reviewed a case in fifty years.

Moreover, the scope of review is much more limited than that afforded to civil litigants appealing from state trial court. The question on petition for review before the California Supreme Court is whether the PUC has "regularly pursued its authority." Cal. Pub. Util. Code § 1757. If the California Supreme Court denies the petition for review, the PUC's decision is final and further review by any California court is not permitted. *See* Cal. Pub. Util. Code § 1416.

[2] Appellants do not challenge the statutory scheme under the California Constitution. Therefore, I decline to address this issue. *Cf. Carreras*

I recognize that under the rational relation standard, the burden on a plaintiff to establish an equal protection violation is significant. The rational relation test, however, is "not a toothless one." *Schweiker v. Wilson,* 450 U.S. 221, 230 (1981) (quoting *Matthews v. Lucas,* 427 U.S. 495, 510 (1976). A state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary and irrational." *City of Cleburne v. Cleburne Living Center,* 105 S. Ct. 3249, 3258 (1985). The Supreme Court, when faced with various arbitrary and irrational classifications, has not found this standard insurmountable. *See, e.g., Metropolitan Life Insurance Co. v. Ward,* 105 S. Ct. 1676 (1985) (invalidating statute that imposed higher tax rate on out-of-state companies); *Zobel v. Williams,* 457 U.S. 55 (1982) (Alaska may not distribute income from its natural resources to residents on the basis of length of residency). In fact, the Court has struck down state procedures similar to the one employed in this case under the rational relation test. *See Lindsey v. Normet,* 405 U.S. 56, 79 (1972) (striking down state statute that imposed an increased appeal bond only for those appealing from summary ejectment actions); *see also Humphrey v. Cady,* 405 U.S. 504, 512 (1972) (state scheme that arbitrarily denies the right to jury to similarly situated persons would violate the equal protection clause). I believe that the statutory scheme in this case is unconstitutional under *Lindsey* and *Humphrey*, and I am unpersuaded by the majority opinion's efforts to distinguish those cases.

At the outset, I disagree with the suggestion that the important rights denied to utilities proceeding before the PUC are constitutionally insignificant.[3] The importance of the special skills that civil juries bring to the fact-finding process has long been recog-

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v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985) (if both state and federal constitutional challenges are made, court must address the state ground before reaching the federal constitutional issue).

[3] The majority opinion, while assuming *arguendo* that jury trials and meaningful appellate review are cognizable rights under the equal protection clause, nevertheless concludes that "the forum selection results in no ascertainable injury. . . . " Opinion at 13.

nized.[4] Similarly, the Court has acknowledged that appellate review, if granted by a state, must be fair and effective for all appellants.[5]

The burden imposed by California's dual system on these two important rights, i.e. jury trial and fair and effective appellate review, cannot be justified in light of the Supreme Court decisions in *Lindsey* and *Humphrey*. The majority opinion acknowledges the importance of these two decisions, but nevertheless does not find them controlling in this case for a number of reasons. I will address each of these reasons in turn.

First, the majority opinion, citing *Lindsey*, notes that a state is not obligated to provide either a right of appeal or a right to jury trial. This argument, while certainly correct, misses the mark. A state may deny these rights to its citizens, but if it grants these rights it may not afford them to some and arbitrarily and irrationally deny them to others. This, in fact, was the essence of the holding in *Lindsey* that a state could not require certain appellants to post a higher bond. *Lindsey*, 405 U.S. at 77 ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."); *see Humphrey*, 405 U.S. at 512 ("[Petitioner's] equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was

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[4] *See, e.g., Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935) (jury trial is "generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases"); *Sioux City & Pacific Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, [illegible] (1874) ("It is assumed that twelve men know more of the common affairs of life than does one man."); *In re United States Financial Securities Litigation*, 609 F.2d 411, 431 (9th Cir. 1979) ("[N]o one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience citizen-jurors bring to bear on a case."), *cert. denied*, 446 U.S. 929 (1980); *see generally* C. Wright, *Federal Courts* 606 (4th ed. 1983).

[5] *See Lindsey*, 405 U.S. at 74-75; *see also Evitts v. Lucey*, 105 S. Ct. 830, 834, 838-41 (1985) (if a state grants appeals as of right to criminal defendants, equal protection notions require that the appeals process be "adequate and effective" for each appellant) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)).

deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment [to a mental institution] under one statute rather than the other.").

Second, the majority opinion relies on *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), for the proposition that the seventh amendment permits the creation of rights and remedies which are enforced only through administrative proceedings. I do not argue with this concept and would have no quarrel if the statutory scheme in this case mandated that all utility condemnation proceedings must be brought before the PUC. Unlike *Atlas Roofing*, the statutory scheme in this case does not merely commit the enforcement of certain rights and remedies to one administrative tribunal, but rather permits the same type of action in two significantly different forums. The important rights involved in this case are not denied to *all* utility/condemnees, but only to those utilities to whom the city unilaterally chooses to deny those rights.

Third, the majority opinion suggests that the arbitrary denial by a city of a condemnee's rights to jury trial and fair and effective appellate review is somehow fair because the city is similarly deprived of those rights if it chooses to proceed before the PUC. The statutory scheme, however, arbitrarily permits a city to decide when it will be afforded these rights and when it will not; the utilities have no such choice. Naturally, a city will forego those rights when it is beneficial to do so, and vice versa.

Fourth, the majority opinion places faith in the ability of cities to promote the legislative purpose behind the dual scheme; that is, channeling the more complex condemnation proceedings to the PUC. However, in failing to provide any meaningful guidelines and giving cities unfettered and unreviewable discretion to choose the forum in which to proceed, the statutory scheme permits the cities to act in derogation of the legislative purpose. For instance, a city is permitted under the statute to take smaller cases to the PUC *and* to take more complex cases to a California state trial court. Such a result, of course, is in direct contradiction

to the statute's avowed purpose.[6] If the statute had indicated that cities were to take the more complex cases to the PUC, then it would be rationally related to the purpose of using the PUC's technical expertise. Absent any statutory criteria, however, the majority leaves it up to the unfettered whim of the city whether the legislative purpose will be served in any given case, or at all.

Finally, the majority opinion states that it was conceivable that the legislature would think that "cities would be in the best position to choose the appropriate forum" because "the municipality is responsible to the public interest in general." I find this argument unrealistic. In each case, a city will choose the forum that will produce the best result for it.[7] If a city believes that in a particular case a jury trial will result in a lower compensation award, it will choose to proceed in state trial court; if not, it will go to the PUC.

I believe that the statutory scheme in this case is arbitrary because its relation to the avowed purpose of using the PUC's expertise in complex cases is simply too attenuated. To allow a condemnor the unfettered discretion to grant or deny similarly-situated condemnees the right to a jury trial and to fair and effective appellate review offends both common sense and the equal protection clause. I therefore dissent.

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[6] Similarly, the Court in *Lindsey* stated: "[t]he claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Lindsey*, 405 U.S. at 78.

[7] I do not mean to imply that cities act in bad faith or otherwise abuse the judicial process. Cities, like all other civil litigants, simply avail themselves of those procedures that favor their position.

Order Granting Plaintiff's Motion for an Injunction Pending Appeal, of the United States District Court for the Northern District of California, Filed February 25, 1985.

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Citizens Utilities Company

United States District Court
Northern District of California

No. C 84-3439 TEH

Jackson Water Works, Inc.,
a California corporation, et al.,
Plaintiffs,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants.

Order Granting Plaintiffs' Motion for an
Injunction Pending Appeal

[Filed Feb. 25, 1985]

The motion of plaintiffs Jackson Water Works, Inc. and Citizens Utilities Company for an injunction pending appeal came on for hearing before this Court on February 25, 1985. After careful consideration of the arguments presented, the Court hereby grants plaintiffs' motion. Accordingly, It Is Hereby Ordered That:

(1) Defendants, their agents, employees and members and all persons acting in concert with them, be and hereby are enjoined, pending the hearing and determination of

plaintiffs' appeal to the United States Court of Appeals for the Ninth Circuit, from proceeding with permitting or participating in any further Public Utilities Commission proceeding or hearing concerning or relating to the petition of defendant The City of Jackson filed with the California Public Utilities Commission to fix just compensation for the acquisition by eminent domain of plaintiff Jackson Water Works, Inc.'s lands, property, and rights or any similar subsequently filed or amended petition.

(2) That this injunction pending appeal may be served by any person selected for the purpose by plaintiff who is eighteen years of age and not a party to this action.

It Is So Ordered.

Date: February , 1985

United States District Judge

Judgment of the United States District Court for the Northern District of California, Filed February 4, 1985.

United States District Court
for the
Northern District of California

Civil Action File No. C-84-3439

Jackson Water Works, Inc., et. al.,
Plaintiffs,

vs.

The Public Utilities Commission et. al.,
Defendants.

Judgment
[Filed Feb. 4, 1985]

This action came on for hearing before the Court, Honorable Thelton Henderson, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that defendants' motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied.

Dated at San Francisco, this 4th day of February, 1985.

William L. Whittaker
Clerk of Court

By: /s/ THELTON E. HENDERSON
Thelton E. Henderson
United States District Judge

Order of the United States District Court for the Northern District of California, Filed February 1, 1985.

In the United States District Court
For the Northern District of California

No. C 84-3439 TEH

Jackson Water Works, Inc., a California corporation, and Citizens Utilities Company, a Delaware corporation,
Plaintiffs,

vs.

The Public Utilities Commission of the State of California, et al.,
Defendants.

ORDER

[Filed Feb. 1, 1985]

This case involves a constitutional challenge to certain provisions of the California Public Utilities Code which authorize the Public Utilities Commission to determine the just compensation to be paid investor-owned utilities which municipalities or other political subdivisions seek to acquire. Both plaintiffs and defendants have filed cross-motions for summary judgment.[1] The parties having fully briefed the issues, the Court heard oral argument on the motions on November 26, 1984, and took the matter under submission at that time. After careful consideration, and for the reasons set forth below, the Court hereby grants defendants' motion for summary judgment and denies plaintiffs' motion for summary judgment.

I. BACKGROUND AND FACTS

Pursuant to Article 12, § 5 of the California Constitution, the State Legislature enacted sections 1401-1421 of the Public Utilities Code (hereinafter "PU Code"). As noted above, these

[1] There is no substantial dispute over material facts; therefore, this action may properly be disposed of on summary judgment. Federal Rule of Civil Procedure 56.

provisions provide a procedure for adjudicating the just compensation to be paid an investor-owned utility which a municipality (or other qualifying entity) seeks to condemn under its powers of eminent domain. The procedure is essentially as follows: The municipality first files a petition with the Public Utilities Commission (hereafter "PUC") for a determination of just compensation. Subsequently, a valuation proceeding is conducted by an administrative law judge, who makes a recommendation to the PUC. Acting in its judicial capacity, the PUC then passes on the law and the facts and fixes the amount of just compensation. The municipality is still required to obtain an actual order of condemnation from a superior court; however, the court is bound by the amount of compensation fixed by the PUC.

Either party may appeal the PUC's determination of just compensation by applying to the California Supreme Court for a discretionary writ of review. PU Code §§ 1416, 1756 *et seq.* Final appeal is to the United States Supreme Court. The above scheme is hereinafter referred to as the "PUC procedure."

Under PU Code § 1421, the municipality can choose to proceed before the PUC, as described above, or to institute eminent domain proceedings in superior court pursuant to California Code of Civil Procedure §§ 1230.010 *et seq.* If proceedings are instituted in state court, either party may demand a jury and the condemnee has the right to all ordinary avenues of appeal.

In the instant case, defendant City of Jackson decided to acquire plaintiff Jackson Water Works, an investor-owned public utility water system in Amador County which serves the City of Jackson. The City chose to file a petition and proceed before the PUC rather than institute eminent domain proceedings in superior court. In response to the petition, a valuation proceeding has been scheduled for February 1985.

On June 4, 1984, plaintiffs filed the instant complaint pursuant to 42 U.S.C. § 1983 against the PUC,[2] its members,[3] the City of Jackson, and others, seeking declaratory and injunctive relief. Plaintiffs' complaint and motion for summary judgment contend that the PUC procedure violates procedural due process under the Fourteenth Amendment of the United States Constitution because the procedure denies them 1) an impartial and unbiased tribunal, and 2) meaningful appellate review. Plaintiffs also contend that the procedure offends the equal protection guarantees of the Fourteenth Amendment because similarly situated utilities can be subjected to substantially different forums, given the municipality's option to proceed before either the PUC or the superior court.

II. PROCEDURAL DUE PROCESS

A. Bias

Due process entitles plaintiffs to an impartial tribunal, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); however, plaintiffs have not persuaded the Court of their claim that the PUC is inherently or systemically biased against utilities when it acts in its adjudicatory function to determine just compensation.

Plaintiffs first point to the fact that the PUC uses an "original-cost" valuation formula when it acts in its legislative rate-setting capacity. Plaintiffs infer from this that because the PUC sets rates more often than it conducts valuation proceedings, the PUC will

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[2] Although state officials, such as members of the PUC commission, are clearly "persons" under § 1983, a state agency itself is not. *Ruiz v. Estell*, 679 F.2d 1115, 1137 (5th Cir. 1982) (holding that Board of Corrections was a state agency and not a "person" for § 1983 purposes); *Whitner v. Davis*, 410 F.2d 24, 29 (9th Cir. 1969) (state college is a state agency and not a "person"). This Court finds that the PUC is a state agency. Since the PUC is therefore not a "person" for the purposes of § 1983, it is hereby dismissed from this action.

[3] It is now clearly settled that judicial immunity is not a bar to prospective injunctive relief against the members of the PUC, who act in a judicial capacity when determining just compensation. *Pulliam v. Allen*, 52 U.S.L.W. 4526, 80 L.Ed 2d 565 (1984).

unavoidably favor this formula over some other formula more favorable to utilities when it determines just compensation. However, even assuming, *arguendo,* that the exclusive use of this formula for purposes of valuation, would indicate bias, plaintiffs have failed to demonstrate that any, much less an undue percentage, of the valuation cases have been determined on the basis of the "original-cost" formula. Moreover, a 1979 PUC opinion expressly states that the "Heilbron rule" is the proper means for determining just compensation. This Rule takes into account various formulas, has been codified in § 1263.320 of the California Code of Civil Procedure, and is the method used in state court condemnation proceedings as well. *East Yolo Community Services District,* 1 C.P.U.C. 2d 474, 476-477 (1979). Thus, plaintiffs have failed to demonstrate that PUC use of the original cost formula in setting rates has resulted in or suggests systemic bias against utilities in valuation proceedings.

Secondly, plaintiffs point to the fact that the PUC acts in both a legislative capacity (when it sets rate bases), and in a judicial capacity (when it conducts valuation proceedings). Plaintiffs infer from this dual function that the PUC is therefore biased because it would be reluctant to reconsider any findings it made pursuant to setting the rate base that would be relevant to the valuation proceeding. However, administrative agencies commonly exercise both legislative and adjudicatory functions, and we find that the PUC's dual functions do not render the Agency an inherently biased tribunal. *CF. Marathon Oil Co. v. Environmental Protection Agency,* 564 F.2d 1253, 1265 (9th Cir. 1977).

Plaintiffs' reliance on the principle that just compensation is purely a judicial function which cannot be circumscribed by legislature, *see Baldwin Park Redevelopment Agency v. Irving,* 156 Cal. App. 3d 428, 439 (1984), is misplaced. While it is clear that the legislative body seeking to take public property should have no hand in fixing the amount of just compensation, this is not the situation here. Although the PUC has a legislative capacity, it is not the legislative body seeking to condemn; nor is it in any way involved in, or a beneficiary of, the condemnation. Thus, this Court finds no basis for concluding that because the

PUC acts in both a legislative and judicial capacity, it is rendered an inherently biased forum in violation of due process principles.

Third, plaintiffs point to the fact that the PUC is on record as favoring acquisition of certain utilities. At the outset, We [sic] note that the PUC has only indicated it favors acquisition of a narrow class of utilities to which plaintiffs do not belong. (*See* Defendants' Opposition to Motion for Summary Judgment, exhibits 1, 3). However, more fundamentally, We do not agree with plaintiffs that such a position supports the inference that the PUC could not act impartially when fixing just compensation.

Finally, plaintiffs point to an admission by the PUC that the "staff has in the past presented evidence in valuation proceedings."[4] However, plaintiffs have not demonstrated that any such evidence is presented in suppport of, or creates the appearance of supporting, the entity seeking acquisition.

The above factors, either individually or combined, do not, in this Court's opinion, establish that the PUC is systematically biased against utilities or predisposed toward entities seeking acquisition when determining just compensation. In addition, the Court notes that plaintiffs have not shown that the Commission has anything to gain, either financially or otherwise, from undervaluing utilities for purposes of just compensation. Nor have plaintiffs shown or even alleged that the PUC has actually or systematically undervalued utilities according to prevailing standards for valuation or denied them just compensation. Based on all the above, this Court concludes that plaintiffs have not sustained their allegation that the PUC is systemically biased against utilities in the exercise of its judicial function, and therefore find no violation of due process on this ground.[5]

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[4] See Reply to Plaintiffs' First Request for Admissions, ¶ 12,

[5] In addition to contending that the PUC is systemically or inherently biased, plaintiffs, in passing, also allege that there is sufficient *appearance* of impropriety to warrant finding the PUC procedure is violative of due process. *See Marshall v. Jerrico,* 446 U.S. 247 (1980). The U.S. Supreme Court has found constitutional violations on this ground in *Tumey v. Ohio,* 273 U.S. 510 (1927) and *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). In the former, the Court overturned a

ADEQUACY OF APPELLATE REVIEW

Plaintiffs' second due process claim concerns the scope of appellate review provided by the PUC procedure. To briefly reiterate, PU Code §§ 1416, 1756 *et seq.* allows either party to appeal the PUC's decision by applying for a discretionary writ of review in the California Supreme Court.[6] Writs are rarely granted; however, a denial does not indicate an absence of review. Rather, it indicates that, after reviewing the application and opposing papers, the Court has decided to affirm the PUC based on the papers submitted. Thus, a denial is a decision on the merits although the order denying the petition is without opinion. *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954), *appeal dismissed*, 348 U.S. 859.

Employing a two-step analysis, plaintiffs first argue that due process entitles them to appellate review because they are denied a full and fair hearing before the PUC. Secondly, they argue that, given their right to appellate review, a balancing of the private and governmental interests at stake indicates that the present appellate procedure is inadequate to satisfy due process standards. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

As plaintiffs concede, it is well settled that "if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide

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conviction rendered by a mayor when the mayor's salary was partially paid by fees and costs incurred when he acted in a judicial capacity. In the latter, the Court invalidated a system in which monies produced by a mayor's court accounted for a "substantial" portion of municipal revenues. The case at bar, however, does not present a situation where the PUC has any financial interest in the outcome, either by its individual members or by the institution as a whole. Nor does this Court conclude that the factors raised by plaintiff to demonstrate actual inherent bias result in an appearnace of impropriety sufficient to establish a constitutional violation.

[6] The Court notes that, under the statutory scheme, all appeals from decisions of the PUC are by application for discretionary writ to the California Supreme Court. Thus, the California Courts of Appeal are presently without jurisdiction to hear such appeals.

appellate review." *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). However, they contend that the PUC does not provide a full and fair hearing because 1) the PUC is inherently biased against utilities when exercising its adjudicatory function, and 2) plaintiffs are prevented from raising every possible defense during the proceeding.

As for the first prong of this argument, this Court has concluded that plaintiffs have failed to establish the inherent bias complained of. *See* discussion, *supra.* The second prong is similarly unpersuasive. Plaintiffs correctly assert that they are precluded from raising the defense that a state statute is unconstitutional in the PUC valuation hearing.[7] However, the *Lindsey, supra,* case that plaintiffs rely on does not hold that a party must be able to raise every possible defense in the *same action;* it only states " '[d]ue process requires that there be an opportunity to present every available defense.' " *Id.* at 66. In fact, the *Lindsey* Court rejected the assertion that Oregon denied its litigants due process by restricting the defenses that could be raised in an unlawful detainer proceeding, noting that "there are available procedures to litigate any claims against the landlord cognizable in Oregon." *Id.* at 65-66. Similarly, the plaintiffs here have the opportunity to litigate such constitutional defenses in state or federal court, as well as on appeal from the PUC decision by way of Application for Writ to the California Supreme Court. PU Code § 1757; *see also Radtke v. Alcoholic Beverage Control Approval Board,* 491 F. Supp. 42 (C.D. CA 1980).

Plaintiffs have predicated their assertion that they are denied a full and fair hearing solely on the two grounds stated above.[8]

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[7] Article III, § 3.5 of the California State Constitution provides that administrative agencies, (such as the PUC) are without power to declare a statute unconstitutional or refuse to enforce a statute on constitutional grounds unless an appellate court has already made such a determination.

[8] Plaintiffs do not attack any other procedural aspect of the PUC valuation proceeding. The court notes that in *Marin Municipal Water District v. Marin Water and Power Co.,* 178 Cal. 308 (1981), the Court held that constitutional considerations did not require the availability of

However, given that the Court is not persuaded by either one, prevailing due process doctrine does not require the state to provide a procedure for appellate review.[9] We acknowledge that review by discretionary writ to the California Supreme Court may not provide certain advantages compared to ordinary review by the court of appeals. However, in light of the above discussion, and the fact that the California Supreme Court must nevertheless pass on the merits before denying the writ, *see Southern California Edison Co. Ltd. v. Railroad Commission,* 6 Cal. 2d 737, 747 (1936). We conclude that the present mechanism for appellate review does not render the PUC procedure constitutionally defective on due process grounds.

EQUAL PROTECTION

Plaintiffs contend that even if the PUC procedure does not offend due process, it nevertheless violates equal protection because it results in similarly situated utilities receiving different treatment. Specifically, § 1401 *et seq.* of the PU Code gives the City of Jackson (and other qualifying political subdivisions), the choice to proceed either before the Commission or in superior court. The effect of this "option," plaintiffs argue, is to create two classes of similarly situated utilities. One class proceeds in state court and can opt for a jury and review by the court of appeals, while the other is brought before the PUC and denied such benefits.

The above classification does not involve a suspect class; nor have plaintiffs alleged denial of any fundamental right.[10] Consequently, under standard equal protection doctrine, the classification must be upheld unless plaintiffs meet their burden of showing

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trial by jury, and that the PUC valuation proceedings did not otherwise violate due process. Issues of bias or the scope of available defenses were not considered by the Court. *Id.* at 315.

[9] Plaintiffs cite no authority holding that due process entitles condemnees, in particular, to appellate review, given a fair hearing.

[10] As noted earlier, plaintiffs do not contend they are denied their right to just compensation. Nor has any due process violation been established.

the classification is not 1) rationally related to 2) a legitimate governmental interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). If there is any "conceivable legitimate purpose that would justify the distinctions made in the state's regulatory scheme," the scheme must be upheld. *In re Lara*, 731 F.2d 1455, 1460 (9th Cir. 1984).

Initially, we must determine whether the government has a legitimate end in having some utilities valued before the PUC while others proceed through state court. Plaintiffs imply that it could not based on its characterization of all investor-owned utilities as "identically situated." However, utilities clearly vary in terms of size, complexity, function, and other factors that may enter into a valuation determination. The Legislature could have conceivably expected that the particular expertise of the PUC would further the interests of justice and economy in some instances but not in others. Thus, it appears that a legitimate governmental interest conceivably underlies the dual forum system.

Plaintiffs further contend, however, that allowing the municipality to choose the forum is not rationally related to such an objective. Given that the PU Code does not provide criteria governing the choice, such choices may be made without consideration of any legitimate governmental objective. Thus, plaintiffs argue, the scheme fails to rationally serve any legitimate interest the government has in having utilities valued in a particular forum.

Although plaintiffs' argument is not without appeal, we decline to find that delegating the forum option to the municipality fatally flaws the PUC procedure. Several factors have entered into this determination. First, the Court questions whether the main differences between the two forums complained of (right to jury and ordinary appeal) have resulted in any ascertainable injury to utilities similarly situated to plaintiffs. The only interest that the parties have in valuation proceeding is a financial interest in the amount of compensation to be paid or received. It is not clear to this Court that proceeding before the PUC causes any injury to this interest. As noted earlier, plaintiffs have not established that those utilities proceeding before the PUC are undervalued rela-

tive to those which proceed in superior court. Nor do they allege denial of just compensation.

Second, it is conceivable that the legislature rationally believed that the designated entities would be well-suited to choose the appropriate forum. Although the legislature did not provide these entities with express criteria to govern their choice, this does not indicate that the legislature intended or expected the acquiring entity to determine a forum arbitrarily or solely for the purpose of depriving the utility of a jury or review by the California court of appeal. After all, the disadvantages plaintiffs complain of cut both ways; a municipality proceeding before the PUC is also precluded from demanding a jury or the ordinary avenue of appeal. Thus, the Legislature could rationally have believed that public entities would exercise their discretion in an appropriate manner in these matters. Moreover, the Legislature may also rationally have believed that as between the two, it would better serve the public's interest to delegate the forum choice to the municipality rather than the utility. While the utility may only consider the narrow interests of its private investors, the municipality is responsible to the public interest in general. Thus, while the Legislature's delegation of the forum choice to the municipality may not always further its objectives, and there may be times where similarly situated utilities are subjected to different forums, it cannot be said that this delegation is irrationally related to legitimate objectives.

Finally, this Court has taken into consideration the fact that our judicial system generally gives the prosecuting party the discretion to make decisions that will affect the procedural and substantive rights of similarly situated defendants. For example, a plaintiff may often have the choice of proceeding in state or federal court, or pursuing one or more of several possible causes of action.

In a case somewhat similar to the case at bar, *Georgia Power Co. v. 54.20 Acres of Land, etc.*, 563 F.2d 1178 (5th Cir. 1978), *cert. denied*, 440 U.S. 907, the Court examined a section of the Federal Power Act which allows certain entities total discretion to " 'exercise . . . the right of eminent domain in the district court . . . *or* in the State courts.' " *Id.* at 1180 (citing 16 U.S.C. § 814

(1970) (emphasis added). The Court held that federal, rather than Georgia, law applied if the plaintiff proceeded in federal court. Although condemnees would thus be subject to less favorable valuation rules, and attorney fees would be unavailable, the Court rejected the argument that a "law permitting Georgia Power [condemning party] to 'grant' the benefits of Georgia law arbitrarily through its choice of forum denies equal protection to landowners sued under the federal rather than the state statute." *Id.* at 1192:

> To the extent the equal protection issue is before us, we find it without merit. There can be no contention that any landowner will be awarded constitutionally inadequate compensation if federal law controls since the federal rules satisfy the requirements of the fifth amendment. *See, e.g., United States v. Miller*, 1943, 317 U.S. 369, 63 S. Ct. 276, 87 L.Ed 336. Nor can we seriously consider the possibility that there are constitutional difficulties whenever a prosecutor or other plaintiff meeting state action requirements may choose between two or more causes of action with different consequences for defendants. If there were, the Justice Department could not constitutionally choose to bring a civil antitrust suit against one offender and a criminal suit against another.

The 5th Circuit subsequently reversed itself on the choice of law issue and decided state law should apply in a district court proceeding as well. However, the switch was not based on any equal protection concerns and the court expressly affirmed it earlier holding on this point. *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1122 n. 15 (5th Cir. 1980). *Cf. United States v. Batchelder*, 442 U.S. 114, 123-24; *State v. Tague*, 310 N.W. 2d 209, 211-12 (Iowa 1981) (if a defendant violates more than one criminal statute, the prosecutor can prosecute under either even if they carry differing penalties without violating equal protection, so long as the government does not discriminate against any one class of defendants).

All of the above, of course, does not rule out the possibility that a particular entity or group of entities could use its choice of forum to unlawfully discriminate against a certain group or class

of utilities. However, this is not the case before us. Rather, plaintiffs ask us to find that the fact that the choice of forum is within the municipality's discretion is, on its face, a violation of equal protection. For all of the above reasons, this we decline to do.

Accordingly, plaintiffs' motion for summary judgment is HEREBY DENIED and defendants' motion for summary judgment is HEREBY GRANTED.

IT IS SO ORDERED.

Dated: February 1, 1985

/s/ THELTON E. HENDERSON
Thelton E. Henderson
United States District Judge

United States Constitution Amendment V.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV, § 1.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution Article I, § 19 (West 1975).

§ 19. Eminent domain; just compensation; possession

Sec. 19. Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

California Constitution Article VI, § 11 (West 1975).

§ 11. Appellate jurisdiction of Supreme Court, courts of appeal and superior courts; findings of fact

The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.

Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.

The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

California Constitution Article XII §§ 1, 5 (West Supp. 1986).

§ 1. Commission; membership vacancies; removal

The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring.

§ 5. Additional authority and jurisdiction of commission; review; eminent domain

The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

California Civil Procedure Code §§ 904.1 (West Supp. 1986), 1230.010-1230.060, 1235.165, 1240.030, 1245.220, 1245.235, 1245.255, 1250.010 (West 1982).

§ 904.1. Superior courts; appealable judgments and orders

An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(d) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(e) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(g) From an order appointing a receiver.

(h) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(i) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(j) From an order or decree made appealable by the provisions of the Probate Code.

§ 1230.010. Short Title

This title shall be known and may be cited as the Eminent Domain Law.

§ 1230.020. Exercise of power

Except as otherwise specifically provided by statute, the power of eminent domain may be exercised only as provided in this title.

§ 1230.030. Acquisition of property; purchase, eminent domain or other means

Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.

§ 1230.040. Rules of practice

Except as otherwise provided in this title, the rules of practice that govern civil actions generally are the rules of practice for eminent domain proceedings.

§ 1230.050. Powers of court

The court in which a proceeding in eminent domain is brought has the power to:

(a) Determine the right to possession of the property, as between the plaintiff and the defendant, in accordance with this title.

(b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order for possession as a matter of right.

§ 1230.060. Public utilities commission; effect on jurisdiction

Nothing in this title affects any other statute granting jurisdiction over any issue in eminent domain proceedings to the Public Utilities Commission.

§ 1235.165. "Proceeding"

"Proceeding" means an eminent domain proceeding under this title.

§ 1240.030. Requirements

The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

(a) The public interest and necessity require the project.

(b) The Project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(c) The property sought to be acquired is necessary for the project.

§ 1245.220. Necessary adoption of resolution

A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article.

§ 1245.235. Notice and hearing; contents; conduct

(a) The governing body of the public entity may adopt a resolution of necessity only after the governing body has given each person whose property is to be acquired by eminent domain and whose name and address appears on the last equalized county assessment roll notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030.

(b) The notice required by subdivision (a) shall be sent by first-class mail to each person described in subdivision (a) and shall state all of the following:

(1) The intent of the governing body to adopt the resolution.

(2) The right of such person to appear and be heard on the matters referred to in Section 1240.030.

(3) Failure to file a written request to appear and be heard within 15 days after the notice was mailed will result in waiver of the right to appear and be heard.

(c) The governing body shall hold a hearing at which all persons described in subdivision (a) who filed a written request within 15 days after the notice prescribed in subdivision (b) was mailed may appear and be heard on the matters referred to in Section 1240.030. The governing body need not give an opportunity to appear and be heard to any person who fails to so file a written request.

(d) Notwithstanding subdivision (b), the governing body may satisfy the requirements of this section through any other procedure that has given each person described in subdivision (a) reasonable written personal notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030.

§ 1245.255. Judicial review of validity; abuse of discretion; rescission and adoption of new resolution

(a) A person having an interest in the property described in a resolution of necessity adopted by the governing body of the public entity pursuant to this article may obtain judicial review of the validity of the resolution:

(1) Before the commencement of the eminent domain proceeding, by petition for a writ of mandate pursuant to Section 1085. The court having jurisdiction of the writ of mandate action, upon motion of any party, shall order the writ of mandate action dismissed without prejudice upon commencement of the eminent domain proceeding unless the court determines that dismissal will not be in the interest of justice.

(2) After the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title.

(b) A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body.

(c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property subject, after the commencement of an eminent domain proceeding, to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

§ 1250.010. Jurisdiction

Except as otherwise provided in Section 1230.060 and in Chapter 12 (commencing with Section 1273.010), all eminent domain proceedings shall be commenced and prosecuted in the superior court.

California Public Utilities Code §§ 1401-1421, 1756, 1757, 1759 (West 1975).

§ 1401. Lands, property and rights defined

As used in this chapter, "lands, property, and rights" includes a part or portion thereof.

§ 1402. Political subdivision defined

As used in this chapter, "political subdivision" means a county, city and county, city, municipal water district, county water district, irrigation district, public utility district, or any other public corporation.

§ 1403. Classes of petitions to acquire public utility

Any political subdivision may, at any time, file with the commission either a petition of the first class, setting forth the intention of the political subdivision to acquire under eminent domain proceedings, or otherwise, the lands, property, and rights of any character whatsoever of any public utility or a petition of the second class, setting forth the intention of the political subdivision to initiate such proceedings as may be required under the law governing the political subdivision for the purpose of submitting to the voters of the political subdivision a proposition

to acquire under eminent domain proceedings, or otherwise, the lands, property, and rights of any character whatsoever of any public utility.

§ 1404. Petition; contents; verifications; copies

Each such petition shall contain the name of the political subdivision appearing as petitioner therein, a description of the lands, property, and rights which the political subdivision intends to acquire, and the names and addresses of all owners and claimants thereof, including each trustee and mortgagee under each deed of trust and mortgage, if known, or a statement that they are unknown. The petition shall pray that the commission fix the just compensation which shall be paid by the political subdivision, under the law, for such lands, property, and rights. The petition shall be signed in the name of the political subdivision and verified by the chairman or other presiding officer or by the secretary or clerk of the legislative or other governing body of the political subdivision. At the time the petition is filed, the petitioner shall also file with the commission additional copies thereof equivalent in number to three more than the number of owners and claimants named in the petition.

§ 1405. Order to show cause; contents

Upon the filing of the petition the commission shall make its order to show cause. The order shall specify the nature of the proceeding, contain a general description of the lands, property, and rights which petitioner desires to acquire by condemnation or otherwise, and direct the owners and claimants named in the petition, who shall also be named in the order, to appear before the commission at a time and place specified in the order, to show cause, if any they have, why the commission should not proceed to hear the petition and to fix the just compensation to be paid for the lands, property, and rights.

The order shall direct the executive director of the commission to serve or cause to be served upon each owner and claimant a copy of the order certified under the seal of the commission to which shall be attached a copy of the petition.

§ 1406. Order to show cause; service

Service of the order to show cause shall be made in accordance with the provisions of the Code of Civil Procedure or by depositing a copy of the order to show cause certified under the seal of the commission with a copy of the petition attached thereto, in the United States mail, enclosed in a sealed envelope, registered, with postage prepaid, addressed to each of the owners or claimants, at the address specified in the petition.

§ 1407. Service by publication; mail service on nonresidents; personal service out of state

If any owner or claimant named in the petition resides out of the State or has departed from the State or cannot after due diligence be found within the State, or conceals himself to avoid service, or is a corporation having no managing or business agent, cashier or secretary or other officer upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the commission, and it also appears by such affidavit or by the petition that a cause of action exists against the owner or claimant on whom the service is to be made or that he is a necessary or proper party to the proceeding, the commission shall make an order that the service be made on such owner or claimant by publication of the commission's order to show cause. The order shall direct that the publication be made in a newspaper designated by the commission as likely to give notice to the person to be served, and for such time as the commission finds to be reasonable, at least once a week, but publication against an owner or claimant residing out of the State or absent therefrom shall not be less than two months. If the address of any owner or claimant, as stated in the petition, is out of the State, the secretary of the commission shall, within 15 days after the making and filing of the order to show cause, deposit or cause to be deposited a copy of that order, certified under the seal of the commission, with a copy of the petition attached thereto, in the United States mail, enclosed in a sealed envelope, registered, with postage prepaid, addressed to such owner or claimant at the address specified in the petition. When publication is ordered, personal service of a copy of the order to show cause and of the petition out of the

State is equivalent to publication and deposit in the United States mail.

§ 1408. Notice of hearing; service

Within 10 days prior to the time set for the first hearing on the petition, which time shall be not less than 30 days after the filing of the petition, the executive director of the commission shall serve or cause to be served upon the petitioner a written notice specifying the time and place of the hearing. In all respects not in this chapter otherwise specified, service and the proof of service shall be made as provided by the Code of Civil Procedure. Upon the completion of service upon the petitioner or upon any owner or claimant named in the petition, the commission shall have full and complete jurisdiction over such petitioner, owner, or claimant, with full and complete jurisdiction, insofar as such petitioner, owner, or claimant is concerned, to make each finding referred to in this chapter. The failure to make service upon any person alleging that he is an owner or claimant but not named in the petition shall in no way affect the jurisdiction of the commission over owners and claimants on whom service has been made.

§ 1409. Hearing; payment of costs; evidence

At the time and place specified in the order to show cause, or at such other time and place as, for good cause, is otherwise ordered by the commission, the commission shall proceed to a hearing on the petition. At such times and in such amounts as is directed by the commission, the political subdivision shall pay to the commission all extra costs as determined by the commission, which the commission incurs to comply with the requirements of this chapter, and if such amounts are not paid by the political subdivision as directed by the commission, the commission may suspend further proceedings on the petition. Evidence may be presented by the political subdivision, by each owner or claimant named in the petition, and by the commission.

§ 1410. Amendment of petition

The commission may, at any time subsequent to the filing of the petition, and prior to making and filing its finding as to just compensation, authorize the amendment of the petition by alter-

ing or modifying the description of the lands, property, and rights, or by adding to or deducting from the lands, property, and rights, and in each other respect including jurisdictional allegations.

§ 1411. Findings; just compensation; severance damages

When the proceeding has been submitted, the commission shall make and file its written finding fixing, in a single sum, the just compensation to be paid by the political subdivision for the lands, property, and rights. If the commission finds that severance damages should be paid, the just compensation for such damages shall be found and stated separately. The just compensation shall be fixed by the commission as of the day on which the petition was filed with the commission.

§ 1412. Acceptance of compensation; payment; execution and delivery of conveyance and release

Within 20 days after the commission has made and filed its finding, the owner of the lands, property, and rights may file with the legislative or other governing body of the political subdivision a written stipulation consenting and agreeing to accept the just compensation fixed by the commission. Upon the filing of the stipulation, the political subdivision shall proceed with all due diligence to provide the necessary funds under the law governing the providing of such funds, for paying the just compensation fixed by the commission. Whenever the just compensation has been tendered by the political subdivision, a deed of grant, bargain, and sale conveying the owner's right, title, and interest in and to the lands, property, and rights to the political subdivision shall be executed and delivered by the owner, and the other claimants who have any right, title, or interest in the property shall execute appropriate instruments conveying or releasing to the political subdivision their respective rights, titles, and interests therein. If the deed or the instruments of conveyance or release are not executed and delivered within 60 days after such tender has been made, the political subdivision may commence an action in a court of competent jurisdiction or proceed under Section 1413.

§ 1413. Failure to accept compensation; initiation of eminent domain proceedings or proceedings for submission of proposition to voters

In the case of a petition of the first class, if the owner does not file the stipulation within such 20 days, the political subdivision, within 60 days after the commission has made and filed its finding, shall commence an action in a court of competent jurisdiction to take such lands, property, and rights, under eminent domain proceedings. In the case of a petition of the second class, if the owner does not file the stipulation within such 20 days, the political subdivision, within 60 days after the commission has made and filed its finding, shall initiate proceedings for the purpose of submitting to its voters a proposition to acquire under eminent domain proceedings the lands, property, and rights. The political subdivision shall not be required, in either case, to delay for more than 20 days after the commission has made and filed its finding, before commencing such further proceedings. In the case of a petition of the second class, if the voters of the political subdivision, as provided by the law governing the political subdivision, vote in favor of any proposition to acquire under eminent domain proceedings, or otherwise, such lands, property, and rights, the political subdivisions shall, within 60 days thereafter, commence an action in a court of competent jurisdiction to take such lands, property, and rights, under eminent domain proceedings, unless the owner has filed with the political subdivision a written stipulation consenting and agreeing to accept the just compensation fixed by the commission.

§ 1414. Failure to initiate proceeding; petition of owner for reimbursement of expenditures; order to show cause

If the political subdivision, in a petition of the first class, fails to file such action in a court of competent jurisdiction within such period of 60 days after the commission had made and filed its finding, or if the political subdivision, in a petition of the second class, fails to proceed diligently to submit the proposition to its voters or fails, if its voters have voted in favor of the acquision of the lands, property, and rights, to file such action in a court of competent jurisdiction within 60 days thereafter, the owner of such lands, property, and rights may file with the commission a

verified petition in writing setting forth that fact. The petition may also set forth in detail the expenditures which the owner has necessarily incurred in the proceeding before the commission.

The commission shall thereupon cause written notice, with a copy of the owners' petition attached thereto, to be served upon the political subdivision, to appear before the commission at a time and place specified in the notice, to show cause why an order should not be made by the commission (a) finding that the political subdivision has failed to pursue diligently its rights, (b) determining that the finding as to just compensation shall no longer be of any force or effect, and (c) determining the resonable expenditures necessarily incurred by the owner which, in the opinion of the commission, should be assessed against the political subdivision. The time specified in the notice shall be not less than 10 days subsequent to the date of service.

§ 1415. Finding and order of commission for reimbursement of expenditures; liability of political subdivision

If the commission determines that the political subdivision, in case of a petition of the first class, has failed to commence the action in a court of competent jurisdiction within 60 days after the commission has made and filed its finding of just compensation, or that the political subdivision, in case of a petition of the second class, has failed to proceed diligently to submit the proposition to its voters or has failed, after its voters have voted in favor of the acquisition of the lands, property or rights, to file such action in a court of competent jurisdiction within 60 days thereafter, the commission shall make and file its order declaring that such finding shall no longer be of any force or effect, and make its finding as to the reasonable expenditures necessarily incurred by the owner in the proceeding before the commission, which should be assessed against the political subdivision. The political subdivision shall thereupon be liable to the owner in the amount thus found by the commission, and the owner may thereupon maintain an action against the political subdivision for such amount in any court of competent jurisdiction.

§ 1416. Finality of compensation finding of commission; eminent domain action; judgment of court; finality of judgment

The finding of the commission fixing the just compensation to be paid by the political subdivision for the lands, property, and rights shall be final and shall not be subject to modification, alteration, reversal, or review by any court of this State. If the court in which the political subdivision has commenced its action, subsequent to the making and filing by the commission of its finding as to just compensation, decides that the political subdivision has the right and power under the law to take the lands, property, and rights, it shall enter a judgment in favor of the complainant in the action, fixing as the just compensation which shall be paid for the taking of the lands, property, and rights, the just compensation fixed by the commission. The judgment may include the allowance of such costs between the parties as is provided for in the law of eminent domain of this State. The judgment of the court insofar as it refers to the just compensation to be paid for the lands, property, and rights, shall be final and shall not be subject to modification, alteration, reversal, or review by any court except as specified in this chapter. The judgment of the court shall include a provision, in substance, that it is subject to modification by reason of such increase or decrease in the just compensation to be paid as may therefter be certified to the court by the commission, as provided in this chapter.

§ 1417. Petition for increase or decrease of compensation; service of petition and notice of hearing; consolidation of petitions

At any time within 30 days subsequent to the entry of such judgment, the owner of the lands, property, and rights may file with the commission a verified petition in writing, alleging that by reason of expenditures made by the owner subsequent to the date of the filing of the original petition with the commission, for the purpose of preserving or improving the lands, property, and rights, or by reason of other acts and occurrences subsequent to that date, the just compensation theretofore fixed by the commission should be increased, and praying that the commission make its finding increasing such compensation. At any time within 30 days subsequent to the entry of the judgment, the political subdivision may file with the commission a verified petition in writing,

alleging that by reason of loss or destruction of the lands, property, and rights, or by reason of depreciation or deterioration thereof or by reason of other acts and occurrences, subsequent to the date of the filing of the original petition, the just compensation theretofore fixed by the commission should be decreased, and praying that the commission make its finding decreasing the compensation. The commission shall in each instance cause a copy of such petition or petitions to be served upon each party other than the petitioner, who was named as the political subdivision, owner, or claimant in the original proceeding before the commission, together with a written notice specifying the time and place of hearing on such petition or petitions, which time shall be within 45 days after the entry of the judgment by the court, and shall cause written notice of the time and place of the hearing to be served upon each petitioner in such petition or petitions. If both such petitions are filed, the commission may consolidate them for hearing and decision.

§ 1418. Finding of increase or decrease; finality

After a hearing, the commission shall make and file its finding fixing, as of the date on which the finding is made and filed, the extent to which the just compensation theretofore fixed should be increased or decreased by reason of the matters alleged in the petition or petitions. If the claim is made that the just compensation theretofore fixed by the commission should be increased by reason of expenditures made by the owner subsequent to the date of the filing of the original petition with the commission for the purpose of preserving or improving the lands, property, and rights the commission may increase the just compensation only to the extent to which the commission determines that such expenditures were beneficial to the lands, property, and rights, and reasonably and prudently made. The finding of the commission fixing the extent to which the just compensation theretofore fixed should be thus increased or decreased shall be final and shall not be subject to modification, alteration, reversal, or review by any court of this State.

§ 1419. Modification of judgment to conform to finding; finality of modified judgment; stay

The commission shall thereupon transmit to the court its finding, certified under the seal of the commission, fixing the extent to which the just compensation theretofore fixed by the commission shall be increased or decreased. The court shall thereupon modify its judgment so as to conform with the finding of the commission. The judgment of the court, as thus modified, insofar as it refers to the just compensation to be paid for the lands, property, and rights, shall be final and shall not be subject to modification, alteration, reversal, or review by any court. The filing of either or both the petitions specified in Section 1417 shall not act as a stay of the judgment in condemnation, but upon the payment of the just compensation fixed in the original judgment of condemnation of the plaintiff in the action shall be entitled to immediate possession of the lands, property, and rights.

§ 1420. Rehearing; judicial review

The provisions of this part with reference to rehearing and review shall be applicable to the findings of the commission made and filed under the provisions of this chapter. Petitions for rehearing shall be filed within 20 days from the date of making and filing the finding as to which a rehearing is desired. If such finding of the commission is set aside by the Supreme Court of the State of California, the matter shall be referred back to the commission for further action in the proceeding before the commission, and the commission may, in taking further action, consider the entire testimony theretofore taken in the proceeding before the commission as well as such further testimony as may be presented in connection with such further action. Should a writ of review be obtained from the Supreme Court of the State of California, the time within which the political subdivision shall file an action in a court of competent jurisdiction or submit the proposition to its voters shall be extended to not more than 60 days beyond the final decision of the Supreme Court upon that writ.

§ 1421. Alternative procedure; eminent domain proceedings

The proceedings provided in this chapter shall be alternative and cumulative and not exclusive, and the political subdivision shall continue to have the right to pursue any other procedure providing for the acquisition under eminent domain proceedings of the lands, property, and rights of any public utility. This chapter shall not be construed as repealing any law of this State providing for such eminent domain proceedings.

§ 1756. Writ of certiorari

Within 30 days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified. For purposes of this article, the date upon which the commission issues its decision denying rehearing, or issues its decision on rehearing, is the date when the commission mails the decision to the parties to the action or proceeding.

§ 1757. Scope of review

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

§ 1759 Jurisdiction

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

California Rules of Court, Rule 28.

Rule 28. Review by Supreme Court

(a) [Time within which court may order review]

(1) [On own motion] If no petition for review is filed, within 30 days after a decision of a Court of Appeal becomes final as to that court the Supreme Court, on its own motion, may order review of the Court of Appeal decision. Within the original 30-day period or any extension of it the Supreme Court may, for good cause, extend the time for one or more additional periods amounting to not more than an additional 60 days in the aggregate. The total time, including extensions, shall not exceed 90 days after the decision becomes final as to the Court of Appeal.

(2) [On petition] Within 60 days after the filing, as provided in subdivision (b), of the last timely petition for review, the Supreme Court may order review of a Court of Appeal decision. Within the original 60-day period or any extension of it the Supreme Court may, for good cause, extend the time for one or more additional periods amounting to not more than an additional 30 days in the aggregate. The total time, including extensions, shall not exceed 90 days after the filing of the last timely petition for review.

42 U.S.C. § 1983 (1981).

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(3)

No. 86-893

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JACKSON WATER WORKS, INC., and
CITIZENS UTILITIES COMPANY
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
and THE CITY OF JACKSON, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a state statutory scheme which accords a municipality the privilege of seeking valuation of property for purposes of condemnation in either of two forums—the State Superior Court or the California Public Utilities Commission—results in a classification which is rationally based and reasonably related to a public purpose affording Petitioners equal protection under the law.

(2) Whether such a statutory scheme affords Petitioners due process of law.

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This proceeding arises because the Respondent City of Jackson, a California municipal corporation, filed a petition pursuant to California Public Utilities Code (P.U. Code), Section 1401, *et seq.*, requesting that Respondent Public Utilities Commission of the State of California fix the just compensation which should be paid by the Respondent City of Jackson for the public utility lands, property, and rights of Petitioner Jackson Water Works, Inc.

The California Public Utilities Commission is a constitutional agency of the State of California having been created by Article 12, Section 1, of the California Constitution. Section 5 of that Article is as follows:

> Sec. 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with

> this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

The provisions of Section 5 were added as an amendment to the State Constitution in 1914. In *Marin Water and Power Company v. Railroad Commission of the State of California*, 171 Cal. 706 (1916) the State Supreme Court concluded that the Commission's authority to fix just compensation for utility property taken by eminent domain as derived from Section 5 is a judicial power.

Pursuant to Section 5 the State Legislature enacted Sections 1401-1421 of the P.U. Code dealing with the subject of the determination of just compensation for acquisition of utility properties. Section 1405 requires the Commission, upon the filing of a petition, to make its order to show cause as to why the Commission should not proceed to hear the petition. Pursuant to a petition filed by the City of Jackson, the Commission issued an order to show cause.

Petitioners Jackson Water Works Inc. and Citizens Utilities Company filed an action on June 4, 1984 in the United States District Court for the Northern District of California seeking declaratory and injunctive relief. Thereafter the Petitioners appeared in the Commission proceeding before an Administrative Law Judge on June 22, 1985 pursuant to the order to show cause, but did not show cause why the Commission should not proceed. In the action before the District Court, after cross-motions for summary judgment, the court issued a written order granting Respondents' motion for summary judgment and entering a judgment for Respondents on February 6, 1985.

Petitioners filed a motion with the District Court for an injunction preventing Respondents from proceeding with the just compensation proceedings. The District Court issued the injunction on February 25, 1985.

Petitioners' appealed the judgment and order to the United States Court of Appeals for the Ninth Circuit which affirmed with one dissent the judgment and order of the District Court.

The Ninth Circuit stayed the issuance of its mandate extending the District Court's injunction pending this Court's disposition of the case.

REASONS FOR DENYING THE WRIT

The petition fails to demonstrate a compelling reason for this Court to grant certiorari. The Petitioners do not demonstrate that conflicts between circuit courts exist. At best they show that on differing facts involving differing interests courts reached differing results. They do not demonstrate that an unsettled question of federal law is present. The issues of equal protection of the laws and due process have been the subject of scores of federal cases including a number of cases before this Court and the issues presented have long been settled by this Court. What Petitioners ask is that the two tier equal protection analysis sanctioned by this Court be re-examined and a new rule issued. Petitioners have not demonstrated that the case presents issues of national importance so that review by this Court is warranted. The Ninth Circuit's resolution of this case accords with precedent and should be allowed to stand.

I

PETITIONERS' BASIC RIGHT TO JUST COMPENSATION IS PROTECTED

At the threshold it should be noted that the central and basic interest that Petitioners have in a proceeding for valuation of property to be taken in condemnation is the financial one of the amount of compensation to be paid them for the taking of property. This is the ultimate right entitled to constitutional protection. The Petitioners have utterly failed to demonstrate either before the District Court (A32-33) or the Ninth Circuit (A-8) that this right has been affected.[1] They merely complain of the process they are compelled to undergo before the Public Utilities Commission in order to receive just compensation. If the

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[1]All references herein are to the appendix filed by the Petitioners. Respondents are filing a supplemental petition setting forth statutes and state constitutional provisions that are cited for the first time in Respondents brief.

right to just compensation is fully protected and not impinged upon how can the process that leads to it be deemed unconstitutional? Petitioners do not complain of substance but of procedure that leads to no ascertainable constitutional injury.

II

THE DECISION BELOW CORRECTLY APPLIES ESTABLISHED DOCTRINES OF EQUAL PROTECTION, DUE PROCESS AND APPELLATE REVIEW.

A. The Ninth Circuit's Equal Protection Analysis Is In Accord With Precedent

Petitioners search in vain to identify an interest or a right that can be characterized as "fundamental." Thus they speak of access to a court (Petition, p. 7), the right to a jury (Petition, p. 8), the right to appeal (Petition, p. 9) and "significant interests" (Petition, p. 10). What Petitioners actually are seeking is a revision of the existing two-tier equal protection analysis so that the economic right they assert will rise to a level whereby it is entitled to heightened or strict scrutiny under an equal protection analysis.

The court below applied a standard of rational basis in establishing a level of review in its equal protection analysis, having concluded that Petitioners economic interest was not a fundamental one. (A. 7-8) And, as has been noted, the right to just compensation was not impaired. In addressing the issue of the rationality of the statute the court below applied the plausible arguable, or conceivable standard. On all counts the court is correct.

The cases cited on this point by Petitioners in their petition are cases wherein the facts demonstrate that other than economic rights were affected so that the Court found that there had occurred a constitutional injury and cases where the majority of the Court held that on the facts no constitutional injury had occurred at all. *Logan v. Zimmerman*, 455 U.S. 422 (1982) (lost cause of action is a lost property right); *United Mineworkers v. Illinois Bar Assn.*, 389 U.S. 217 (1967) (right to assembly and free speech impaired); *U.S. Retirement Board v. Fritz*, 449 U.S.

166 (1980) (no denial of equal protection); *Richardson v. Belcher*, 404 U.S. 78 (1971) (no denial of equal protection); *Humphrey v. Cady*, 405 U.S. 504 (1972) (restriction of personal liberty by commitment to an institution without a jury trial); *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal alien children's right to education); *Cleburne v. Cleburne Living Center*, ____ U.S. ____ 87 L.Ed2d 313, (1985) (special use permit requirement for mentally retarded, but not for other groups, discriminates); *Weber v. Aetna Casualty & Security Co.*, 406 U.S. 164 (1972) (discrimination against children on the basis of illegitimacy); *Vlandis v. Kline*, 412 U.S. 441 (1973) (irrebuttable presumption of nonresidence is discriminatory); *Williams v. Vermont*, 472 U.S. 14 (1985) (state tax discrimination); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (sex based discrimination against woman regarding social security benefits); *Schweiker v. Wilson*, 450 U.S. 221 (1981) (no denial of equal protection); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (administrative procedure terminating benefits is fair); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (civil servant's interest in employment is a property right so that some form of pretermination hearing is required).

B. Petitioners Have Not Been Denied Due Process of Law. Petitioners Do Not Have A State Right To A Jury Trial

Petitioners are not guaranteed any particular form of state procedure under the due process clause because what is required is reasonable notice and an opportunity to be heard.[2] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Dohany v. Rodgers*, 281 U.S. 362 (1930). The equal protection clause does not demand uniformity of state procedure as, for example, restriction of eminent domain suits to state trial courts. The Ninth Circuit decision is eminently correct in the regard.

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[2] Petitioners do not deny that they received notice of the Commission's Order to Show Cause or that they will be afforded a fair hearing. Indeed they have appeared before the Commission in a prehearing conference on June 22, 1984.

As the Court stated in *Dohany v. Rodgers*, 281 U.S. 362 at page 369:

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. Reetz v. Michigan, 188 U.S. 505, 508 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390; Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 70 L. ed. 818, 46 Sup. Ct. Rep. 384; Bauman v. Ross, 167 U.S. 548, 593, 42 L. ed. 270, 289, 17 Sup. Ct. Rep. 966; A. Backus Jr., & Sons v. Fort Street Union Depot Co., 169 U.S. 569, 42 L. ed. 859, 18 Sup. Ct. Rep. 445. 74 L. ed. 912.
>
> "Nor does the equal protection clause exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another. That condemnation proceedings under the Highway Act are conducted on behalf of the state is in itself sufficient basis for the exercise of the legislative judgement in providing for it a different procedure from that prescribed for the exercise of eminent domain by a private corporation. See A. Backus Jr. & Sons v. Fort Street Union Depot Co. supra (169 U.S. 570, 42 L. ed. 859, 18 Sup. Ct. Rep. 445)."

The Petitioners complain that the California statutory scheme provides identically situated litigants substantially different rights (Petition, p. 3). The scheme may provide a different procedure but it does not affect basic rights. All who are subjected to the procedure are treated equally. Appellants' basic right—the right to just compensation—is not affected. And, while the procedures in a State Superior Court and before the Commission are different the law is applied equally.

The Ninth Circuit concluded that the law of valuation is the same before a Superior Court and before the California Public Utilities Commission and is codified in Section 1263.320 of the

California Code of Civil Procedure. (A14). As the Commission explained in *East Yolo Community Services District,* 1 CPUC 2d 474 (1979), at pages 476-477:

> "The just compensation for the taking of the land, property, and rights of the condemnee is measured by the market value of such land, property, and rights. In *Sacramento etc. R.R. Co. v. Heilbron* (1909) 156 Cal. 408, 409, market value was defined as:
>
> > '. . . the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable.'
>
> "The Commission has applied a similar definition, which appears to be derived from the *Heilbron* rule. In *City of Riverside* (1972) 74 CPUC 193, 202 the Commission stated:
>
> > 'We have used, as the measure of value of the properties herein, the concept of the highest price, estimated in terms of money, that a willing buyer would pay to a willing seller for the property if exposed for sale on the open market, where each is under no unusual pressures of time or circumstance and each has knowledge of all the uses and purposes for which it is reasonably capable of being used.'
>
> "The Heilbron Rule has in turn been codified in section 1263.320 of the Code of Civil Procedure as follows:
>
> > (a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

> '(b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable.'
>
> "The Commission concludes that the *Heilbron* rule, as variously expressed, constitutes the standard which the Commission should apply when valuing public utility property for just compensation purposes."

In all respects Petitioners have been afforded due process of law.

C. Petitioners Have A State Right To Judicial Review Adequate To Insure Protection of Rights Under The Federal Constitution

One prong of Petitioners' assault on the state procedures in issue is that the procedures deny them the right to judicial review because the prescribed manner of appeal from a Commission decision is by petition for writ of review to the State Supreme Court and that the California Supreme Court rarely grants such review. However, under state law a denial of a petition for review by the State Supreme Court is a decision that fulfills the functions of a review.

The means to petition for judicial review is provided by Section 1756, P.U. Code, "which serves in effect the office of an appeal." *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891, 901 (1979). The State Supreme Court in *Consumers* explained that even summary denial of a petition for writ of review without opinion is a decision on the merits for res judicata purposes. See also *Pacific Telephone and Telegraph Co. v. The Public Utilities Commission*, 600 F.2d 1309 (9th Cir. 1979). Thereafter, Petitioners have the right to petition from a final judgment of the California Supreme Court for a review of any federal questions in the United States Supreme Court with no loss of other federal rights. 28 U.S.C. 1257. *Consumers*, by the way, is one of many examples where the court has granted a petition for a writ.

The state judicial review proceedings available to Petitioners are adequate to vindicate federal or other claims. Petitioners have a speedy and effective remedy available for such claims because any challenge to an order of the Commission will go directly to the Supreme Court of the State of California, bypassing the intermediate California appellate court system. (Section 1759 P.U. Code.) Furthermore, Petitioners have a specific right to challenge the validity of a Commission order or decision on the ground that it violates rights under the Constitution of the United States, rights Petitioners assert will hereby be violated. (Section 1760 P.U. Code.) Moreover, when a Commission order is challenged on the ground that it violates rights under the U.S. Constitution the Supreme Court of California "shall" exercise an independent judgment on the law and facts. (Section 1760 P.U. Code.) Finally, such actions before the State Supreme Court shall be preferred over all other civil cases except election causes (Section 1767 P.U. Code).

Contrary to Petitioners' allegations, there is therefore no judicial deference (Petition, pp. 15-17) to the power to take and the procedures for fixing just compensation do not place the power to take beyond judicial constraint.

D. Because Petitioners Have Been Afforded Due Process and the Right of Appeal There Is No Judicial Deference to the Concept of Conceivable Justifications for Legislation Affecting Judicial Remedies

Petitioners advance the assertion that courts are deferring to the conceivable justification standard arguing that procedu ral rights are judicial guarantees and that procedures should be free of arbitrary distinctions. (Petition, pp. 17-19). The statutory scheme under attack in this case is free of arbitrary distinctions and the courts below so found.

Petitioners imply that the decision below is counter to this Court's precedent in *Lindsey v. Normet*, 405 U.S. 56 (1792) and *Humphrey v. Cady*, 405 U.S. 504 (1972). In *Lindsey* an Oregon statute provided that if a tenant intended to appeal an adverse decision in a rent dispute the tenant must post two sureties, while all others were required to post single bond. In *Lindsey*, the

discrimination against the poor is obvious. Here all who are subjected to the procedure before the California Public Utilities Commission share an equal right to appeal. *Humphrey*, on the other hand, concerned a procedure whereby a person's confinement to a sex deviate facility could be extended for five years without a jury trial. The important right of personal freedom was at issue. That sort of right is not at issue here.

III

THERE DOES NOT EXIST A CONFLICT IN CIRCUITS

Petitioners argue that certain suggestions by this Court have resulted in conflicting decisions by lower courts, thereby implying the existence of a conflict between decisions in different circuits. (Petition, p. 13). The cases cited in support of this argument display nothing more than the traditional equal protection analysis of the standard of scrutiny, the nature of the right (fundamental or not), and if rational relationship to a state or governmental purpose exists.

Thus in *Diebler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986) a city charter provision required that candidates for a city office not be delinquent in tax payments. The court held that the restriction did not impinge upon a fundamental right but that the interest of the City in screening candidates bears no rational relationship to a governmental purpose because an individual decision not to pay taxes does not logically reflect the candidate's commitment to the city but may rest solely on economic, ideological or other personal grounds. There a candidate was deemed delinquent owing to a protest against a tax. In *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) a state statute limited non-economic losses in medical malpractice to $250,000. The court held that malpractice victims were not a suspect class, tort damage is not a fundamental right and that the legislature had a plausible reason for the legislation. In *Frazier v. Heebe*, 788 F.2d 1049 (5th Cir. 1986) a rules requirement that members of the bar of a Federal District Court in Louisiana have an office within the confines of the District were upheld because the *pro hac vice* provisions of the rules permitted non-members to practice and

because the regulatory scheme bore a rational relationship to the court's goal of efficient administration of justice.

All three cases merely applied the traditional two tiered analysis.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated, San Francisco, California, December 30, 1986.

Respectfully submitted,

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UNITED STATES CODE
28 U.S.C.A. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

CALIFORNIA CONSTITUTION
ARTICLE 12 SECTION 1

Art. 12, § 1 CONSTITUTION

§ 1. Commission; membership vacancies; removal

Section 1. The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two-thirds of the membership of each house concurring.

CALIFORNIA CONSTITUTION
ARTICLE 12 SECTION 5

§ 5. Additional authority and jurisdiction of commission; review; eminent domain

Sec. 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

CALIFORNIA PUBLIC UTILITY CODE

§ 1760. Constitutional questions

In any proceeding where the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

§ 1767. Preference of actions and proceedings

All actions and proceedings under this part and all actions or proceedings to which the commission or the people of the State of California are parties in which any question arises under this part, or under or concerning any order or decision of the commission, shall be preferred over, and shall be heard and determined in preference to, all other civil business except election causes, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the commission in any action or preceeding in which he is allowed to intervene.

CITED AS 1 CPUC 2d 474

DECISION No. 90360, APPLICATION No. 57906
(June 5, 1979)

OPINION

By the filing of its petition on March 2, 1978, East Yolo Community Services District (East Yolo) invoked the Commission's jurisdiction under Public Utilities Code[1] Section 1401 *et seq.* to determine the just compensation for the acquisition by East Yolo of the public utility properties of the Washington Water and Light Company (Washington).

On March 21, 1978, the Commission issued Decision No. 88619 directing Washington to show cause why the Commission should not proceed to hear the petition of East Yolo and to fix the just compensation to be paid for the lands, properties, and rights of Washington. Pursuant to Decision No. 88619, prehearing conferences were held on April 14 and August 22, 1978, and public hearings were held before Administrative Law Judge Robert T. Baer on October 31 and on November 1, 2, 3, 27, and 28, 1978, in San Francisco.

Concurrent opening briefs were filed on January 26, 1979, and concurrent closing briefs were filed March 13, 1979. The matter is now ready for decision.

Description of Washington's Service Area and Facilities

Washington's service area is entirely within unincorporated areas of Yolo County. It generally encompasses areas known as Bryte, Broderick, and West Sacramento. On the north and east the service area boundary is the Sacramento River, the midline of which is the border of Sacramento and Yolo Counties. The service area is bisected by the Interstate 80 freeway and includes the Interstate 80 and 880 freeway interchange. The most heavily developed part of the service area is directly across the Sacramento River from Old Sacramento. The Southern Pacific and the

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[1] All references hereafter to code sections are to the Public Utilities Code, unless otherwise indicated.

Sacramento Northern railroads and the Sacramento River Deep Water Canal cross the service area.

Water is furnished to the 6,067[2] customers from 22 wells and through approximately 455,000 feet of distribution main. Five steel tanks provide storage of approximately 1.6 million gallons. Two major treatment plants, with total capacity of 7.1 million gallons per day, treat all the water produced by six of the wells.

Issues

The central issues in this proceeding are:

(1) What standard should the Commission apply in valuing Washington's facilities?

(2) Is the Commission bound to consider only the reproduction cost new less depreciation (RCNLD) method of valuation in arriving at its findings of just compensation, as Washington argues; or may the Commission consider that method together with the market data and capitalization of earnings approaches, as East Yolo argues?

(3) Was East Yolo's market data and capitalized earnings evidence properly admitted?

(4) What weight should the Commission give to Washington's evidence of value using the RCNLD method, yielding an estimate of value of $13,007,450,[3] and to East Yolo's evidence using market data and capitalized earnings, yielding estimates of value ranging from $2 million to $2.6 million?

Discussion

The just compensation for the taking of the land, property, and rights of the condemnee is measured by the market value of such

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[2] As of March 2, 1978, service was provided to 5,224 flat-rate and 843 metered customers. The great majority of flat-rate customers are residential customers, while the metered customers are generally industrial and commercial customers.

[3] This figure includes $11,924,800 for facilities, $350,650 for land, and $732,000 for the taking of Washington's service area. (Exhibit 8.)

land, property, and rights. In *Sacramento etc. R.R. Co. v. Heilbron* (1909) 156 Cal 408, 409, market value was defined as:

> "... the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable."

The Commission has applied a similar definition, which appears to be derived from the *Heilbron* rule. In *City of Riverside* (1972) 74 CPUC 193, 202 the Commission stated:

> "We have used, as the measure of value of the properties herein, the concept of the highest price, estimated in terms of money, that a willing buyer would pay to a willing seller for the property if exposed for sale on the open market, where each is under no unusual pressures of time or circumstance and each has knowledge of all the uses and purposes to which the property is best adapted and for which it is reasonably capable of being used."

The *Heilbron* rule has in turn been codified in Section 1263.320 of the Code of Civil Procedure, as follows:

> "(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.
>
> "(b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable."

The Commission concludes that the *Heilbron* rule, as variously expressed, constitutes the standard which the Commission should apply when valuing public utility property for just compensation purposes.

The RCNLD Method of Valuation

Washington contends that in valuing public utility property the Commission must apply the RCNLD method to arrive at fair market value. It cites in support of that proposition *City of Riverside*, supra, and certain other Commission decisions.[4a] Although the Commission in the *City of Riverside* case used the RCNLD method in arriving at its finding of just compensation, it did not hold that the RCNLD method was the only method of valuation that could be used to value public utility property. In fact, at 74 CPUC 202 the Commission stated:

> "We also recognize that there is no precise formula for determination of just compensation. The Commission, in previous just compensation cases, has considered a number of value criteria, with varying emphasis, in the performance of its duty to reach an independent judgment on just compensation based on resolution of conflicting testimony and other conflicting data in records before it. Among the criteria that have been considered are: (a) original cost rate base, depreciated; (b) comparable sales; (c) capitalization of earnings and (d) present day cost; i.e., (1) reproduction cost new less accrued depreciation of physical properties; (2) market value of lands, easements and rights-of-way, (3) market value of water rights, and (4) organization costs and going concern value. The Commission has also considered record facts having an adverse effect on market value."

The other Commission decisions cited by Washington do not purport to bind the Commission to follow the RCNLD method nor do they invariably apply that method. For instance, in *City of Redding* (1934) 39 CPUC 193, 195 the Commission stated that ". . . the reproduction cost to be arrived at is not itself value but only one of several criteria of value." And in *SMUD* (1942) 44 CPUC 467 the Commission found that the RCNLD for a portion of PG&E's electric distribution system in the Sacramento area was $8,318,000, but nevertheless held that the just compensation was $10,600,000. PG&E's and SMUD's estimates of market

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[4a] See Washington's opening brief, pp. 4-5.

value, based principally on earning power, were $12,500,000 and $9,400,000, respectively.

Washington cited *PG&E v Devlin* (1922) 188 C 33 for the proposition that the Commission must determine just compensation by the RCNLD method. However, *Devlin* does not so hold. In *Devlin* the only evidence of value offered was based on the RCNLD method. Thus, no issue was raised as to the appropriateness of that method or of any other method of valuing public utility properties for just compensation purposes.

Other Commission, state, and federal decisions were cited by Washington to support its contention that the Commission must apply the RCNLD method, but none of them support that position.[4b]

As additional support for the Commission use of the RCNLD method, Washington argues that only such method provides compensation for all elements of utility property. This point refers to property acquired by the utility by contribution or by advances in aid of construction. The argument is made that because such property is not included in utility plant for ratemaking purposes, the earnings of the utility do not reflect its existence and thus it is ignored by capitalized earnings studies. We believe, however, that this is largely a specious issue. It is tantamount to arguing that, because capitalized earnings method is not the RCNLD method, it may not be employed. The question is not whether the capitalized earnings methodology involves an accounting of each item of utility property as does the RCNLD method. Rather the question is whether capitalized earning is a valid means of estimating just compensation, or fair market value, which is used by reasonable buyers and sellers of properties to arrive at negotiated sales prices and which is recognized by the court and the legislature as an appropriate valuation tool. This question will be addressed with more particularity, *infra*.

[4b] In *U.S. v 564.54 Acres of Land, No. 78-488*, decided May 14, 1979, the United States Supreme Court held that allowing respondent the fair market value of its property, rather than the cost of substitute facilities, is consistent with the principles of fairness underlying the Just Compensation Clause of the Fifth Amendment.

East Yolo squarely addressed the issue of contributions and advances in its closing brief. It first stipulated that it would assume the liability of Washington's unrefunded advances, thus making it unnecessary to compensate Washington for the property represented by those advances. Of course, the property represented by refunded advances is presumably in rate base and is thus reflected in capitalized earnings studies.

With regard to contributed property East Yolo argues:

> "... these contributions are in fact water utility facilities that were constructed and paid for by the water users. The water users were then required to donate those facilities to Washington ... Why should the water users now be required to pay Washington ... for those same facilities? We submit [that] the proper valuation for contributions is to recognize that they are in fact donated to the utility company subject to a trust or a third party beneficiary contractual obligation that they be used for utility purposes. Putting it another way the only interest that the utility company has in the contributed facilities is a possessory interest which must be assumed by the acquiring public agency. Certainly the law of just compensation does not contemplate or require that the water users build and pay for say a $200,000 treatment plant, then be required to donate it to the private utility and then when the water users elect to condemn the private utility pay the private utility another $200,000 for that treatment plant which the water users paid for and were required to donate in the first instance.
>
> "Frankly, we know of no case which has considered the point but we submit that the proper approach to contributed property is that it is in essence held by the private utility as a trustee for the benefit of the water users, and that the interest of the private utility in that contributed facility is a nominal interest and that in essence the public agency that acquires that contributed facility acquires it subject to the trust or third party beneficiary contractual responsibility.
>
> "We submit that the valuation of contributions or contributed facilities should be treated differently than other utility

> property. The facilities represented by contributions were required to be donated by the water users. A valuation approach which recognizes this fact is in essence a '... method of valuation that is just and equitable' (Code of Civil Procedure, Section 1263.320(b). It is certainly not 'just and equitable' to require the water users to buy back from the utility company the same property that they were previously required to donate to that utility company." (East Yolo's closing brief pp. 22-24.)

The foregoing quotation expresses the correct view on the issue of valuation of contributed facilities. The Commission concludes that it is not bound to employ only the RCNLD method, either on the basis of the authorities cited by Washington or on the basis of the argument that only such method compensates Washington for all valuable elements of utility property.

Admissibility of Capitalized Earnings and Market Data Evidence

Washington contends that evidence of capitalized business income is inadmissible under California law, citing Evidence Code Section 819.[5] However, East Yolo cites the case of *South Bay Irr. Dist. v. California-American Water Co.* (1976) 61 CA 3d 944, which holds that such evidence is admissible, relying upon Section 814 of the Evidence Code.[6] (See 61 CA 3d at 980.) The Court in *South Bay* reasoned that since capitalization of the

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[5] "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and the existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon)."

[6] "The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for his opinion."

income of a condemned public utility is not a matter included in Evidence Code Section 819, it may be a basis for an opinion or determination of the market value of the condemned public utility.

We conclude that the *South Bay* case states the correct rule on the admissibility of evidence of capitalized earnings of a public utility in a just compensation case.[7]

Washington's arguments concerning market data evidence are basically directed to the weight of that evidence, and not its admissibility. The following discussion of the evidence will address those arguments.

Discussion of the Evidence

The following table summarizes the evidence of value offered in this proceeding:

Witness	*Valuation Method*	*Result 000*	*Opinion Of Value 000*
Rhodes, for East Yolo	Capitalization of Earnings	$1,636-2,235	
	Sales Comparison	2,635	
	Cost Approach	1,641-2,242	
			$2,000
*Powell, for East Yolo.....	Capitalization of Earnings	2,800	
	Market Approach	2,840	
	RCNLD	8,200-9,400	
			2,600
Clendenen, for East Yolo ...	RCNLD	9,570	
			None
Stone, for Washington	RCNLD	11,924.8	
			11,924.8

*Ex. 3, pp. 12-13 indicates ratebase of $2,840,000 as of March 2, 1978.

East Yolo stated in its opening brief, p. 2:

> "In our view it is of little moment whether the reproduction cost new estimate is $9,570,000 as testified to by Mr. Clendenen (Vol. 1, RT pp. 117-1120) or $11,924,800 as

[7] The Commission does not concede that the Evidence Code or the Code of Civil Procedure and District Court of Appeal decisions interpreting those codes necessarily govern the admissibility of evidence in its proceedings. (See Section 1701 of the Public Utilities Code.) However, such statutory and case law will be considered persuasive authority.

> testified to by Mr. Stone (Exhibit 5, p. 12) or some other sum, and we don't feel that it would serve any useful purpose to discuss in detail the specifics of the respective reproduction cost new less depreciation estimates."

Accordingly, the Commission will accept Washington's figure of $11,924,800 as the RCNLD of Washington's facilities (exclusive of the land value and other items of damages claimed).

Mr. Stone, Washington's valuation witness, was of the opinion that RCNLD equalled just compensation. He considered no other valuation method in making his study. Thus, his opinion of value must stand or fall on the validity of the proposition that RCNLD equals just compensation, i.e., that no other valuation methodology is appropriate in this case.

The evidence in this proceeding supports a finding that there is a relevant market for water companies in California. Admittedly, sales of water companies do not occur as frequently as sales of raw acreage or three bedroom houses. however, such transactions do occur with sufficient regularity for us to conclude that evidence of those sales would shed light upon the value of the subject property. However, regardless of whether there is a relevant market for property "[T]he Evidence Code provides that . . . its fair market value may be determined by reference to matters of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property including where appropriate, but not limited to, (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or reproduction less depreciation) formula." (Legislative Committee Comment to Code of Civil Procedure Section 1263.320.)

We are convinced that an expert in forming an opinion as to the value of the subject property could not reasonably consider solely the RCNLD method of valuation.

We are impressed by East Yolo's argument with respect to the total price tag Washington has placed on its operation.

> "Looking at the bottom line Washington Water & Light Company and Citizens Utilities Company contend that they

are entitled to 'just compensation' of $14,773,408,[8] for the taking of utility property that has produced over the last twelve years average annual net income of only *$43,670* (see Exhibit 2-C)."

* * *

"... No knowledgeable prospective purchaser of utility property would just ignore income and market data and in essence buy a water utility for a price that is *338* times the average annual net income that has been obtained from the utility property...

"Bluntly stated any knowledgeable purchaser would look at the Washington Water & Light Company and Citizens Utilities Company's price tag of $14,773,408 and conclude that he could invest that sum in high grade bonds or certificates of deposit and realize an annual income of about $1,477,340 (10%) and that it would be silly to spend $14,773,408 to acquire a water utility that had been able to generate only $43,670 of [average] annual net income. In other words a knowledgeable purchaser would realize that a conservative investment of the $14,773,408 in high grade bonds or certificates of deposit would result in an annual income that was *thirty* (30) times higher than the annual net income that the water utility property had been able to produce.

"Taking that into account, and considering that this water utility will require major expenditures of about $10,500,000 to correct water pressure and water quality deficiencies (Exhibit 1, p. 37; Vol. 1, RT pp. 87-88, 113-116) and additional sums to replace 'Material Parts of Washington's system' which are approaching 'the probable end of their service lives' (Vol. 4, RT pp. 417-419), no one in his right mind would even consider paying the $14,773,408 price that

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[8] The sum of $14,773,408 includes $11,924,800 for facilities, $350,650 for real property, $575,335 for severance and related damages, $1,190,623 for loss of the Port Sacramento Industrial Park (PSIP) System, and $732,000 for loss of the undeveloped service area. (Exhibit 8.)

Washington Water & Light Company and Citizens Utilities Company contend that they are entitled to receive for this water utility property." (Opening Brief, pp. 106-107)[9]

That Mr. Stone did not apply the *Heilbron* standard (as codified in Code of Civil Procedure Section 1263.320(a), *supra*) is clear from his own testimony. Mr. Stone was asked:

"Q And I take it, then, you didn't appraise this property, then, to determine the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with a reasonable time allowed in which to find a purchaser, buying with full knowledge of the uses and purposes for which it was adopted and for which it was capable?

'A It might represent that. But I didn't use that as any theorem of my appraisal." (Vol. 3, RT pp. 395-396.)

We have determined that it is reasonable in this instance to apply the *Heilbron* standard (as codified, *supra*) in valuing Washington's property. It has also been determined that willing buyers and sellers of such property would not look merely to an appraisal using the RCNLD method to arrive at the price. Mr. Stone did not apply the *Heilbron* standard. He did not consider any other valuation methodology in making his appraisal. He conceded that the income of property was a "very important element in the purchase of property", but that he gave absolutely no weight or consideration to that factor.[10] Washington is asking the Commission to place a value on its property without consider-

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[9] Mr. Powell, one of East Yolo's appraisers, testified to the same effect. (Exhibit 3, pp. 17-18.)

[10] 'Q. . . . Would any knowledgeable buyer of any income-producing property, including public utilities, ever even attempt to arrive at the value of what he's going to pay for that property if he didn't know what the income might be?

"A. That's a very important, very important element in the purchase of property. No question about it.

"Q. And that's something that you gave absolutely no weight or consideration to?

ing that very important factor of income. However, the Commission cannot fail to consider income and still apply the *Heilbron* standard. Thus, the RCNLD method cannot be considered to define or govern our finding of just compensaton in this proceeding.

The Market Data Approach

Both witnesses Rhodes and Powell for East Yolo used market data in arriving at their opinions as to the fair market value of the facilities to be taken.

Mr. Powell used data for nine sales of water companies or separate divisions of water companies to nonpublic agency buyers. The sales took place between 1962 and 1976 and the sales prices exceeded $0.8 million. Upon analysis of these sales Mr. Powell concluded that the sales prices generally approximate rate base. The departure from rate base ranged from a discount of one percent to a premium of 42 percent. The sale with the 42 percent premium included 1,800 acres of land which the buyer considered developable. Excluding that sale and another sale (where the premium was 23 percent), involving special circumstances not present here, the range was from a discount of one percent to a premium of eight percent of rate base.

Mr. Powell also analyzed the sale of Washington to Citizens Utilities Company in 1967 and found that the purchase price was at a premium of about 19 percent over rate base, again in the general range of the rate base rather than at a multiple of rate base. He testified that such sale "shows that replacement cost new less depreciation was not a significant factor in determining the amount paid by Citizens Utilities for the property." (Exhibit 7, p. 15.)

Mr. Rhodes, an appraiser for East Yolo, also used market data in arriving at his opinion of fair market value. He analyzed four sales occurring between 1969 and 1976 and determined that the price paid per service connection is a reasonably common denominator. The price per service connection ranged from $365 to

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"A. Not for this appraisal, for condemnation purposes." (Vol. 3, RT pp. 401-402.)

$507. Each of the four sales was analyzed by comparing it to the subject property on the basis of the general condition of the physical plant, the amount of accrued depreciation, and the proportion of equity involved in the price. Mr. Rhodes then adjusted each price to give effect to the three factors. After adjustment the prices ranged from $273 to $407 per service connection. Based on this range Mr. Rhodes concluded that Washington was worth $400 per service connection. The witness then multiplied 6,588 connections[11] times $400 per connection to arrive at his rounded market data estimate of $2,635,000.

Washington criticizes East Yolo's market data evidence on the basis that the sales selected are not comparable, that the number of sales of water companies are insufficient to establish a market, and that the sales did not reflect the most significant part of the market sales to public entities.

None of these contentions are meritorious. First, Mr. Powell's study avoids the criticism of lack of comparability. He does not state that because utility A sold for $2,000,000; therefore, Washington must sell for $2,000,000. It would, concededly, be difficult to find two water companies whose facilities were so similar in type and quantity that a recent sale of one could be said to establish the value of the other. What he does state is that sales of water companies between private parties occur at a price approximating rate base,[12] and that, therefore, rate base can be used as an indication of market value.

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[11] Washington's figures in connections are 6,595 connections, including 487 public fire hydrants and 42 private fire protection connections. (Exhibit 4, p. 9.)

[12] Mr. Stetsen, an expert appraiser for Washington, supported this conclusion in his "rebutal" testimony:

"Q. As I understand your testimony . . . you indicated . . . that the . . . sales [between private utilities] are generally based on rate base. . . .

"A. I didn't say that. I said valuation of private sales usually indicates that they are sold at a value approaching rate base.

"Q. So, in essence, those sales show that they are transferred, purchased and sold at a price approximating rate base?

Mr. Powell's study screens out factors which would eliminate particular sales as noncomparable, factors such as sales dates remote in time, involving locations far from the subject property, and facilities vastly different from those of the subject property.

Actually, Mr. Powell's study states no more than what should be obvious to anyone familiar with the utility business in California. Public utility earnings are regulated by this Commission. The basis of those earnings is an original cost, depreciated rate base. The sale price of a utility's facilities does not determine its earnings, since under this Commission's regulation, the new owner may not inflate rate base to reflect a sale price in excess of the original cost, depreciated rate base. No informed and reasonable private sector buyer, absent special circumstances, would pay two, three, or four times the rate base for a hypothetical utility earning 10 percent on rate base, since he would earn only 5 percent, 3.33 percent, or 2.5 percent, respectively, on his investment.

Second, the limited number of sales evidence herein provides sufficient evidence of a market, as we have previously concluded. Although not regularly traded, a few sales of these properties would be a valid indication of the value of similar property precisely because of the Commission's regulation.

Third, the sales selected were from the private sector only. None of the sales involved a public agency purchaser. East Yolo's witnesses did not include such sales in their study because, in their view, such data is inadmissible under Section 822 of the Evidence Code.[13] Even assuming Section 822 is inapplicable, the lack of data on sales to public agencies merely affects the weight

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"A. Yes, or a multiplier of rate base, a small multiplier." (Vol. 6 RT, p. 657.)

[13] Evidence Code, Section 822 states in relevant part:

"Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property:

"(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain."

of the evidence. Since, Washington offered no evidence of sales to public agencies, we are not called upon to weigh such evidence against the evidence of sales in the private sector.

Evidence Based on Capitalization of Earning

In his capitalization of earnings study Mr. Powell used Washington's "earning power", rather than its actual earnings to arrive at a fair market value. In other words he assumed that Washington's rates produce dollar earnings equivalent to its authorized rate of return multiplied by its rate base. Under this assumption, market value is equal to rate base. Accordingly, Mr. Powell concluded that, since Washington's rate base is $2,840,116, the capitalization of earnings approach would indicate a market value of the facilities being appraised in the amount of $2.8 million as of March 2, 1978.

Mr. Rhodes used a different methodology in arriving at market value based on capitalized earnings. First, he obtained his capitalization rate by examining four sales of water companies occurring between 1969 and 1976. For each of the four sales he mathematically computed the relationship between net operating revenue and the sale price in percentage terms and found that the net operating revenue as a percentage of sale price ranged from 5.2 percent to 6.69 percent after adjustment. He selected 5.5 percent[14] as the capitalization rate he would use for further calculations.

Next he developed three net operating revenue figures ($90,000; $122,950; and $104,160) using three different methods. When divided by the capitalization rate of 5.5 percent, market values of $1,636,000, $2,235,000, and $1,894,000 resulted. From this range of market values Mr. Rhodes concluded that his capitalization of income methodology indicated a market value of $2,000,000.

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[14] The average of the four figures, 5.2 percent, 6.2 percent, 6.69 percent, and 5.3 percent, is 5.9 percent. However, the use of the figure 5.5 percent benefits Washington.

Just Compensation

In arriving at a finding of just compensation we have discounted the evidence of value based on the RCNLD method. As indicated above, we do not believe any reasonable, willing buyer would for a moment consider using such a valuation methodology to determine the price he would pay for the facilities, rights, and properties of a utility company such as Washington. On the other hand, the evidence of value based upon capitalization of earnings, market data, and rate base places the value of Washington's property consistently in the range of $2,000,000 to $2,840,000. We find that the just compensation for the taking of Washington's lands, properties, and rights is $3,000,000[15] as of March 2, 1978.

Severance and Other Damages

Washington claims that in addition to compensation for loss of its physical plant and land in the sums of $11,924,800 and $350,650, respectively, it is also entitled to damages of $575,335 for severance and related damages, of $1,190,623 for loss of the PSIP System, and of $732,000 for loss of its undeveloped service area.

With respect to the item of $1,190,623 for loss of the PSIP System it is sufficient to note that there is no evidence of Washington's ownership of the PSIP System. Certainly there is no reason in law or equity to compensate Washington for the taking of property it did not own on the valuation date of March 2, 1978.[16]

Washington also claims damages of $732,000 for loss of its undeveloped service area. However, we believe that such a claim

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[15] This finding of value is based on the assumption that when it acquires the properties of Washington, East Yolo will also assume Washington's obligation for unrefunded advances for construction which totaled $1,267,024 (Exhibit 3-A) as of December 31, 1977.

[16] We are informed by the parties that Washington purchased the PSIP System on November 30, 1978. Section 1417 provides that the owner may file a petition for augmentation of just compensation to reflect expenditures made after the filing date of the original petition.

is not a proper subject of severance damages. Washington asks this Commission to speculate upon the future potential of the service area and to judge Washington's loss of business opportunity from the taking of its facilities therein. Washington's citations in support of its claim are not persuasive and the factual basis for the claim, resting as it does on Mr. Stradley's projections of significant customer growth in the future, is not entitled to much weight in light of Mr. Stradley's contrary projections in a recent rate proceeding.

The last item of $575,335 for severance and related damages is a composite of several different items. Severance damages to Washington are calculated as follows:

(1)	Deferred debit Account No. 146	$102,133
(2)	Preliminary Survey Charges, Account No. 142	6,334
(3)	Transfer, storage, sale, and disposal expenses	8,151
(4)	Lease payments	6,500
(5)	Mortgage prepayment penalties	3,593
(6)	Additional interest costs	38,007
	TOTAL	$164,718

In addition to damages of $164,718 to Washington, Citizens Utilities Company and its affiliated companies also claim $159,617 for lost allocated charges, consisting of:

(7)	Administrative and general expenses	$103,246
(8)	Insurance premiums	2,232
(9)	Data processing expenses	3,766
(10)	Salaries and wages	1,838
(11)	Retraining and relocating expenses	48,535
	TOTAL	$159,617

Finally, as related damages Washington claims $251,000 for the following items:

(12) Legal fees	$150,000
(13) Real estate valuation fees	12,000
(14) Stone and Webster fees	70,000
(15) Cost for company witnesses	14,000
(16) Other company expenses	5,000
TOTAL	$251,000

To summarize, Washington claims:

Severance damages to Washington	$164,718
Severance damages to Citizens, et al.	159,617
TOTAL SEVERANCE DAMAGES	$324,335
RELATED DAMAGES	251,000
GRAND TOTAL	$575,335

It would unduly lengthen this opinion for the Commission to discuss each of these 16 items of alleged severance and related damages. Suffice to say that severance damages represent the decline in value of the property of the owner left after a partial taking by the condemnor. Since East Yolo is taking all of Washington's utility facilities, there is nothing left to be damaged. Thus, items one through eleven are inappropriate items of severance damages.

Attorney fees and costs of suit are recoverable when a statute so provides. Washington has cited no statute to support its claim for damages in items twelve through sixteen.

We are convinced that no award of finding should be made with respect to the sixteen items of severance and related damages.[17]

Conclusions of Law

1. The *Heilbron* rule should be applied in valuing public utility property for just compensation purposes.

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[17] For an extended discussion of each of the sixteen items see East Yolo's opening brief, pp. 108-120.

2. The Commission is not compelled, as a matter of law, to employ only the RCNLD method in arriving at fair market value in a just compensation proceeding.

3. Capitalized earnings and market data evidence was properly admitted into evidence.

Findings of Fact

1. There is a relevant market for water companies in California.

2. Evidence of sales of other water companies sheds light upon the value of the subject property.

3. It is not reasonable to consider solely the RCNLD method of valuation in this proceeding.

4. Willing buyers and sellers of water companies in California would not look merely to an appraisal using the RCNLD method to arrive at the price they would pay or accept for such property.

5. Water companies are bought and sold in California at prices approximating rate base.

6. It is reasonable in valuing the property of Washington Water and Light Company for just compensation purposes to accord the greatest weight to evidence of capitalized earnings, market data evidence, and rate base, and the least weight to evidence of value based upon RCNLD.

7. The just compensation to be paid by East Yolo Community Services District for the lands, property, and rights of Washington Water and Light Company is the sum of $3,000,000 as of March 2, 1978, the day on which the petition was filed with the Commission.

8. No severance damages should be paid.

9. No related damages should be paid.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 5th day of June, 1979.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
CLAIRE T. DEDRICK
LEONARD M. GRIMES, JR.
Commissioners

I dissent.
VERNON L. STURGEON, *Commissioner*

Supreme Court, U.S.
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No. 86-893

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

JACKSON WATER WORKS, INC., and
CITIZENS UTILITIES COMPANY,
Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SAN GABRIEL VALLEY WATER COMPANY IN SUPPORT OF PETITION

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THE STATE OF CALIFORNIA, et al.,
Respondents.

BRIEF OF AMICUS CURIAE SAN GABRIEL VALLEY WATER COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

San Gabriel Valley Water Company respectfully submits this brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Written consent to the filing of this brief has been obtained from all parties and has been lodged with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

San Gabriel Valley Water Company ("San Gabriel") is one of several hundred privately owned utility companies serving California. Like Petitioner, San Gabriel is the respondent in an eminent domain valuation proceeding brought by a municipality and pending before the California Public Utilities Commission ("PUC"). In instituting that action, the condemnor

had the unrestricted discretion under the same statutory scheme at issue here to litigate before either the PUC or the superior court. Because the condemnor elected to proceed before the PUC, San Gabriel will not be afforded a jury trial or meaningful opportunity to appeal. Both rights are provided when a condemnor chooses to proceed in superior court.

Like Petitioner, San Gabriel has been placed in a class of privately owned utilities subjected to condemnation which is not afforded the same procedural rights provided identically situated parties. San Gabriel's interest in a jury trial and a meaningful appeal is not based on legalistic abstraction. As demonstrated below, the PUC adheres to a policy favoring condemnation of certain privately owned utilities and employs valuation standards calculated to advance that policy. Absent the safeguards of jury trial and meaningful appellate review, the PUC is free to improperly use its judicial power to advance its legislative goals at the expense of San Gabriel and others.

SUMMARY OF ARGUMENT

The state statutory scheme at issue violates the Equal Protection Clause because it fails the rational basis test. The first part of the test is "whether the challenged legislation has a legitimate purpose." Appendix to Petition, pp. A-8, A-9. The Ninth Circuit identified an apparent legitimate legislative purpose behind establishing the PUC and the superior court as alternate forums: the PUC's expertise presumably qualifies it to hear larger, more complex cases. Without conceding that point, San Gabriel does not challenge that conclusion in this case.

However, the California statute fails the second part of the rational basis test, *i.e.* "whether the challenged classification promotes that purpose." Appendix to Petition, p. A-9. The statutory scheme bestows unlimited discretion on a condemnor to proceed in superior court or before the PUC. Thus, a condemnor is empowered to discriminate between condemnees on any basis even if the classification thereby created

is not rationally related to the legislative purpose. This arbitrary discrimination violates the Equal Protection Clause since it results in the denial of the rights to both jury trial and meaningful appeal. *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (denial of jury trial); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972) (denial of meaningful appeal).

The decision of the majority avoids this conclusion through the fiction that the condemnor will always exercise its unlimited discretion in a way consistent with legislative purpose. ("Presumably, the legislature believed that the City would exercise its discretion in an appropriate manner." Appendix to Petition, p. A-12.) This is a dangerous precedent which assumes away the second part of the rational basis test and is inconsistent with the decisions of this Court.

In applying the rational basis test where the power to discriminate has been delegated by the state to another public instrumentality (e.g., a city), this Court has asked whether the power delegated is so broad as to permit the governmental instrumentality to engage in arbitrary discrimination with no rational relation to a legitimate legislative purpose. *Humphrey v. Cady, supra,* 405 U.S. 504, 512. This Court has never engaged in the fiction that a public instrumentality, which is given the power to act arbitrarily, will be presumed to act properly.

Such a fiction is dangerous since it permits states to engage in discrimination on any basis simply by avoiding explicit statutory classifications while delegating to its agents unrestricted discretion to discriminate. The majority opinion below engaged in this fiction even though the state agent is a party to the litigation in which the classification is applied and, therefore, has interests to advance which are unrelated to the efficient adjudication of complex cases. In short, the majority is willing to assume the condemnor engaged in discrimination to advance the legislative purpose when, as the dissent notes, common sense suggests the discrimination is rationally related only to the condemnor's litigation interests. Appendix to Petition, p. A-20.

The arguments advanced in this brief do not repeat the arguments made by the petitioner, who asks this Court to address the rational basis/strict scrutiny dichotomy and to accomodate through equal protection standards the importance of the interests affected by the state scheme. San Gabriel files this brief because it believes this Court would be assisted by an analysis under the rational basis standard. As that analysis demonstrates, if the opinion of the Ninth Circuit is not reversed, its force as precedent threatens the future viability of the rational basis test. If that test is rendered ineffective, this Court might then have no other choice but to adopt an entirely new approach to enforcing the Equal Protection Clause.

ARGUMENT

I

THE PETITION SHOULD BE GRANTED BECAUSE OF THE FREQUENCY AND SCOPE OF THE DISCRIMINATION INVOLVED AND BECAUSE OF CONFLICTS BETWEEN THE DECISION BELOW AND OPINIONS OF THIS COURT.

There are several important reasons why this Court should exercise its discretion to grant the petition for a writ of certiorari. First, the problem raised by this case is not unique. Petitioner and San Gabriel are only two of many investor owned utilities in California that have been subjected to valuation proceedings before the PUC. The property of all those companies has been valued without jury trial or meaningful appeal. Both rights are afforded similarly situated companies in proceedings before the superior court.

Second, it is also vital to consider the potential scope and effect of the problem in the future. There are nearly 300 investor owned water utility companies, as well as numerous other investor owned utility companies, in California. The collective assets of those companies are worth billions of dollars. Each of these companies will be subject to the statu-

tory scheme at issue should a state instrumentality decide to condemn.

As demonstrated in part III of this section, the PUC has a policy favoring the condemnation of certain types of privately owned utilities and valuing those utilities in a way to encourage condemnation. It is reasonable to expect that state instrumentalities with the power of eminent domain will be encouraged, and the statutory scheme at issue will be applied with even greater frequency, in the future.

Third, at least one other state has enacted a similar statute. Thus, the scope of the equal protection problem in this case and the precedential effect of the decision below are of national concern. Under New Jersey law, the Port Authority of New York is given the power of eminent domain over property in New Jersey needed for air terminal purposes. *N.J.S.A. 32:1-35.15.* Like the California statute, New Jersey law gives the Port Authority the unrestricted option of proceeding under the normal New Jersey condemnation procedures or under special procedures devised for the Port Authority. *N.J.S.A. 32:1-132.* Under the normal procedures, a jury trial is available upon request. *N.J.S.A. 20:3-12(b); 20:3-13(a), (b).* Under the special procedures, the amount of compensation afforded the condemnee is decided by a judge without a jury. *N.J.S.A. 32:1-35.15(i).* A majority of the New Jersey Supreme Court rejected an attack on this statutory scheme based on the Equal Protection Clause. *Port of New York Authority v. Heming*, 34 N.J. 144, 167 A.2d 609 (1961). The majority and dissenting opinions in that case are strikingly similar in approach to their counterparts in the Ninth Circuit decision at issue here.

Finally, and most important, the petition should be granted because the opinion of the Ninth Circuit conflicts with decisions of this Court which define the content of the rational basis test. As the following analysis demonstrates, the Ninth Circuit's opinion sets a dangerous precedent which, if left undisturbed, provides states with a mechanism for rendering the rational basis test meaningless.

II

THE CALIFORNIA STATUTORY SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT EMPOWERS CONDEMNORS TO DISCRIMINATE ARBITRARILY AND WITHOUT REGARD TO ANY LEGITIMATE STATUTORY PURPOSE.

A. The California Statutory Scheme.

The property of an investor owned utility can be condemned in California under two very different procedures. The condemnor may institute a proceeding in the superior court, which is the usual forum for condemnation litigation. *Cal. Civ. Proc. Code §§ 1230.060, 1250.010.* In such a proceeding, each party has the right to have the question of compensation determined by a jury. *Cal. Const. art. I, § 19.* Each party is also entitled as a matter of right to appeal such determination to the California Court of Appeal. *Cal. Civ. Proc. Code §§ 904.1, 1230.040; Cal. Const. art. VI, § 11.* The parties may also seek review of the Court of Appeal's decision by the California Supreme Court. *Cal. Rules of Court, Rule 28.* Further, the California Evidence Code must be followed by the trial court, *Cal. Evid. Code § 300.*

Alternatively, the condemnor may bring the proceeding before the PUC. The valuation determination then is made by the PUC based upon a decision of an administrative law judge regularly employed by the PUC. Neither an administrative law judge, nor a member of the PUC is required to be a member of the bar or have a legal education, and the proceedings need not be governed by the rules of evidence. *Cal. Pub. Util. Code § 1701.* No jury trial is available. *Cal. Pub. Util. Code § 1411.* Moreover, no meaningful right to appeal from the PUC is provided. The condemnee may only petition the California Supreme Court for a writ of review. *Cal. Pub. Util. Code §§ 1416, 1756, 1759.* The scope of review is much narrower than exercised over a superior court judgment; the only issue is whether the PUC "regularly pursued its authority". *Cal. Pub. Util. Code § 1757.* As petitioner notes, the California Supreme Court does not have a copy of the record when it

decides whether to grant review, has not granted such a writ in a valuation case in approximately fifty years and, in the seventy year history of the statutory scheme at issue, has never reversed, modified or even remanded a compensation decision of the PUC.

The power to select between these procedures is unilateral; only the condemnor has the power and the condemnee has no right to object to the condemnor's choice. The condemnor's discretion is absolute; the statute places no limits on that discretion and no guidelines are established to encourage choices consistent with the purpose of the legislation. In other words, the state instrumentality seeking to condemn the privately owned property can make its selection of forum and procedures on any basis, and without any explanation. (See, *e.g.* Petition p. 14, fn. 12.)

B. This Statutory Scheme Fails the Second Part of the Rational Basis Test.

While rational basis is not a demanding standard for judging equal protection claims, it is "not a toothless one." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981), quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The test has two parts. First, it must be determined if the challenged legislation has a legitimate purpose. Assuming a legitimate purpose, it must then be decided if the discrimination permitted by the statute bears a rational relation to that purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-63 (1981), *rehrg. den.* 450 U.S. 1027.

The Ninth Circuit had no difficulty finding a legislative purpose behind establishing the PUC as an alternative forum for private utility condemnations:

> "It appears that the California legislature, in creating the dual forum system, expected that the particular expertise of the PUC would further the interests of justice and economy in some instances but not in others. Presumably, the larger, more complex adjudications would be handled by the PUC." Appendix to Petition, p. A-9.

As noted, San Gabriel does not challenge this conclusion.

However, as noted by the dissent, the California statutory scheme fails the second part of the rational basis test. The condemnor is given unlimited discretion to choose between the alternative procedures. If the condemnee so chooses, it may proceed in superior court with complex cases and bring simple cases before the PUC. In fact, the condemnor need not base its exercise of discretion on the size or complexity of the case. The condemnor is free to exercise its choice on any basis, including how sympathetic a jury or the PUC is likely to be toward a given condemnor or against a given condemnee. Thus, the classifications authorized by this delegation of discretion are purely arbitrary and bear no rational relation to the acknowledged legislative purpose. Such a conclusion is compelled by three opinions of this Court.

(i.) Lindsey v. Normet.

In *Lindsey v. Normet*, *supra*, 405 U.S. 56, this Court considered an Oregon statute which provided that, in an eviction proceeding for non-payment of rent, a tenant who wished to appeal from an adverse decision must post a bond for twice the amount of rent expected to accrue pending appeal. Oregon law imposed a lesser bond requirement to appeal decisions in other types of civil cases. 405 U.S., at 74-75.

This Court applied a rational basis test to the tenant's equal protection claim. 405 U.S., at 73-74. The first part of that test was deemed satisfied since it was clear that a state could have a legitimate legislative purpose for burdening the right to appeal:

> "[A] State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession . . . ." 405 U.S., at 77.

However, this Court unanimously agreed that the second part of the rational basis test was not satisfied:

> "The double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord .... The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." 405 U.S., at 77-78.

The same reasoning applies to the California statutory scheme which empowers condemnors to force some condemnees into a proceeding in which they are denied any meaningful appeal while allowing other condemnees full appellate rights. As in *Lindsey,* there is no logical connection between the purpose of the California legislation — channeling complex cases to the PUC — and a classification which denies any meaningful appeal to utilities haled before the PUC. Indeed, logic dictates that it is the complex case in which error is most likely and appellate review most needed.

Even assuming that such a logical connection exists, the California statutory scheme is still defective because, as in *Lindsey,* condemnors are permitted to engage in discrimination which is entirely arbitrary and unrelated to the legislative purpose. Condemnors are not limited to bringing complex cases before the PUC. Condemnors are not even guided in that direction by the statute. Instead, condemnors are free to make whatever classification they desire, including bringing simple cases before the PUC while sending the complex matters to the superior court. In fact, that is precisely what has occurred in this case: Petitioner services a small community and presents a condemnation problem of little complexity. Petition, p. 14, fn. 12.

It is important to realize what arguments are *not* advanced by *Lindsey* or in this analysis. First, this analysis does not rest on the premise that there is a due process right to meaningful

appeal in a condemnation action. The argument is simply that, *if* a state affords such right to some privately owned utilities in condemnation actions, it may not arbitrarily deny that right to similarly situated parties:

> "The Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review .... When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet, supra*, 405 U.S. 56, 77.

Second, it is not contended that a state must employ identical procedures for all condemnation actions. Assuming a legitimate legislative purpose, it is clear that a state may establish different procedures for different classes of condemnors or different types of condemnation cases. But the California scheme does not send certain cases to the PUC and certain cases to superior court. Rather, cases of any sort can be brought in either forum. Thus, the availability of appeal and jury trial depend not on a legislative determination of appropriate procedure for a specific class of case but depend on the whim of the condemnor. Such an arbitrary basis for discrimination is contrary to the notion of equal protection.

(ii.) Humphrey v. Cady.

This Court in *Humphrey v. Cady, supra*, 405 U.S. 504 reached similar conclusions concerning an apparently arbitrary state classification that deprived petitioner of the right to a jury trial. In *Humphrey,* petitioner had been committed to the custody of a state agency for compulsory treatment pursuant to a statute concerning sex offenders. Following the procedures established by that statute, petitioner was entitled to a hearing before a judge. 405 U.S., at 507. But another state statute permitted certain mentally ill individuals to be committed only following a jury determination. 405 U.S., at 508. It appeared to this Court that the grounds for committing individuals under the two statutes were the same, although the case was remanded for the purpose of making such a determi-

nation. 405 U.S., at 510. This Court noted the seriousness of the equal protection issue raised by what appeared to be unlimited discretion vested in the state prosecutor to proceed under either state statute:

> "The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." 405 U.S., at 512.

The instant case presents a similar situation. Condemnors, which are instrumentalities of the state, are given unrestricted freedom to subject condemnees to either a jury trial or a proceeding in which there will be no jury. In the words of *Humphrey*, the allocation of the right to jury trial is left entirely to the "arbitrary decision of the State." *Ibid.* If there is any question as to the scope of discretion granted condemnors by the California statute, this Court should, consistent with *Humphrey*, remand for the purpose of examining that question.

(iii.) Logan v. Zimmerman Brush Co.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court was confronted with both due process and equal protection claims. Appellant had filed a complaint with the Illinois Fair Employment Practice Commission alleging employment discrimination. State law required the commission to act on the complaint within a specified period of time. Apparently through inadvertence, the commission failed to act in time. The Illinois Supreme Court held that, as a result of the commission's failure to act, the appellant had lost his right to redress. 455 U.S., at 426-427.

The opinion of this Court reversed on due process grounds. 455 U.S., at 432. However, six members of this Court wrote or joined in concurring opinions deciding that, under a rational basis standard, equal protection had also been denied.

Justice Blackmun, who also authored the opinion of the Court, noted in his concurrence that the state law requiring prompt action by the commission had a legitimate legislative purpose: employers needed protection from frivolous charges of discrimination. 455 U.S., at 439. However, he concluded that, to the extent the statute terminated claims because the commission did not act promptly, the statute failed the second part of the rational basis test:

> "Here, of course, the [statute] may operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire administrative and judicial review process. . . . I have no doubt that [the statute] is patently irrational in the light of its stated purposes." 455 U.S., at 440.

Justice Powell employed a similar approach in his concurrence. Reasoning that the statute could have the legitimate purpose of protecting against frivolous claims or permitting the timely disposition of suits, he concluded that the second part of the rational basis test had not been satisfied:

> "[T]he challenged classification, which bore no relationship to the merits of the underlying charges, is arbitrary and irrational when measured against either purpose." 455 U.S., at 444.

A similar analysis prevails here. The California statute makes no effort to link the classifications which condemnors are empowered to create with any legitimate legislative purpose. Instead, the rights to meaningful appeal and jury trial can be extended or withdrawn at the whim of the condemnor.

In fact, the discrimination permitted by the California statute is far more troubling than that created by the statute in *Logan*. The classification at issue here is not the product of accident or inadvertence. Rather, as Judge Pregerson pointed out in his dissent from the decision below, common sense suggests that condemnors will take full partisan advantage of the unilateral power granted them to choose between alternative procedures. They will "simply avail themselves of those

procedures that favor their position." Appendix to Petition, p. A-20 and fn. 7. Thus, where it seems a jury may be sympathetic, the condemnor may be expected to choose the superior court forum. Where the PUC may seem more receptive to the condemnor's case than a jury or appellate court, the condemnor will select the PUC forum.

Consider the instance where a public agency is condemning two water utilities operating within its jurisdictional boundaries. One has the reputation of providing prolonged poor service to local customers; the other has given excellent service and stands in local good repute, but consistently has been at odds with the PUC. The condemning authority, without restriction and as a matter of course, can choose the local court and jury as a forum for case one and the PUC as a forum for the second matter. This power to choose a forum has more than just a hypothetical effect and compounds the unequal protection in the state scheme. As demonstrated in part III of this section, the PUC permits its legislative policies to influence the way it measures compensation when it sits as a tribunal in a valuation case.

It is almost inevitable that such considerations will influence a condemnor's thinking. Indeed, counsel for condemnor could conceivably violate counsel's obligations as a zealous advocate if he or she did not exploit the significant advantage bestowed by California law to choose forums and procedures. The Fourteenth Amendment should make this Court wary of the legitimacy of legislative purpose where a state awards itself procedural advantages in litigation seeking to deprive one of life, liberty or property.

C. The Ninth Circuit's Response.

The Ninth Circuit responded to the argument that the California statute fails the rational basis test. The response was that, even though unlimited discretion to discriminate is delegated to condemnors, it should be *assumed* that con-

demnors will only exercise that discretion consistent with legitimate legislative purposes:

> "[I]t is conceivable that the legislature rationally believed that cities would be in the best position to choose the appropriate forum. Although the legislature did not express criteria to govern the City's choice, this does mean [sic ?] that the City selects the forum for the specific purpose of depriving the utility of a jury or review by the state court of appeals. The selection of the administrative forum also deprives the City of a jury determination and intermediate review. Presumably, the legislature believed that the City would exercise its discretion in an appropriate manner."[1] Appendix to Petition, p. A-12.

This is a dangerous precedent which is inconsistent with the decisions of this Court. Applying this reasoning to *Humphrey v. Cady, supra*, 405 U.S. 504, this Court's equal protection concerns would be erased since it would be assumed that the state prosecutor who was given two procedures from which to choose would exercise the choice consistent with presumed legislative intent. Similarly, no equal protection issue would be presented in *Logan v. Zimmerman, supra*, 455 U.S. 422, since it would be assumed that the Illinois Fair Employment Practices Commission would only permit frivolous claims to expire.

The majority in the court below simply misconstrued the second part of the rational basis test. They assume that if, in some instances, the unlimited power to discriminate could be applied consistent with legislative purpose, then the creation of that power must be constitutional. But this Court has held that if the power to discriminate can be applied arbitrarily, the statute creating that power is not saved merely because the power may sometimes work rationally to advance the legisla-

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[1]The use of "sic" in the quote suggests error because, as written, the passage seems to state just the opposite of what the Ninth Circuit must have intended to say. Presumably, the passage should read "this does not mean . . . ."

tive purpose. For example, in *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court struck down the double-bond requirement even though it would logically tend to screen out some frivolous appeals. This Court held that the requirement was arbitrary since it *also* tended to burden non-frivolous appeals brought by those unable to post the bond. 405 U.S., at 78.

The Ninth Circuit's decision is dangerous because it establishes an easy to follow formula for any state wishing to insulate improper discrimination from the Equal Protection Clause. Instead of explicitly establishing an improper classification in a statute, a state need only delegate to one of it agents the unrestricted power to discriminate. The Ninth Circuit will then assume that any ensuing discrimination was employed for the purpose of advancing a legitimate legislative purpose. Such an assumption is made even in the face of circumstances which suggest, as here, that the classification is and will continue to be employed for other reasons.

In effect, this approach makes it impossible to fail the second part of the rational basis test since it assumes the necessary rational connection between the discrimination and the legislative purpose. The rational basis test is then converted into "a mere tautological recognition of the fact that [the legislature] did what it intended to do." *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in judgment).

Under the decision of the Ninth Circuit, even racial classifications normally subjected to a much higher level of scrutiny could be concealed and then assumed away. For example, a city might seek to condemn the property of a business owned by members of a racial minority. The city could then exercise its discretion under the California statute to select the PUC forum because the community from which a jury would be selected was composed primarily of members of that same minority. Alternatively, the city could select the superior court because very few persons of the particular racial minority make up the local jury panel. In either case, the majority below would simply assume the city had exercised its discretion

consistent with legitimate legislative purpose: the need to channel complex cases to the PUC. The improper racial discrimination would be concealed by the fiction that the city had proper motives. The need to apply a strict scrutiny test would never become apparent because an evaluation of the true motives of the city would not be undertaken.

This hypothetical underscores the need to apply the rational basis test to invalidate a state delegation of unrestricted discretion to discriminate. What seems to be an arbitrary classification is frequently an impenetrable mask for discrimination on a more invidious basis. If the dangers inherent in any arbitrary classification scheme are merely assumed away, interests which lie at the very core of the Fourteenth Amendment will be jeopardized.

III

THE DENIAL OF EQUAL PROTECTION IS SUBSTANTIAL AND AFFECTS SIGNIFICANT RIGHTS.

A petitioner claiming an equal protection violation bears the burden of demonstrating discrimination "of some substance." *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), *rehrg. den.* 416 U.S. 1000. The opinion of the District Court below "relied primarily on the conclusion that the procedural differences in the forums are insufficient to give rise to an ascertainable injury." *Appendix to Petition, p. A-10.* The majority below seemed to agree that the denial of equal rights to appeal and to jury trial is not constitutionally significant: "The forum selection results in no ascertainable injury since the same substantive law is applied." *Appendix to Petition, p. A-13.*

This Court's decisions compel the conclusion that Petitioner has suffered a substantial denial of equal protection. Faced with a state statute which imposed different appellate bond requirements on different types of cases, this Court in *Lindsey*

v. Normet, supra, unmistakably held that the right to appeal was significant for equal protection purposes:

> "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause . . . .
>
> "It cannot be denied that the double-bond requirement heavily burdens the statutory right of a [Forcible Entry and Wrongful Detainer] defendant to appeal." 405 U.S., at 77.

The right to appeal in the instant case has not been just heavily burdened. As noted in Part II, A of this section, Petitioner is afforded no meaningful appeal.

Similarly, this Court has also made it clear that the right to jury trial is important under the Equal Protection Clause:

> "the State, having made a jury determination generally available . . . could not, consistent with the Equal Protection Clause, arbitrarily withhold it from a few." *Humphrey v. Cady, supra,* 405 U.S. 504, 508 (1972), citing *Baxstrom v. Herold,* 383 U.S. 107, 110-112 (1966).

In fact, equal protection is more substantially eroded in this case than in either *Lindsey* or *Humphrey.* Both the right to jury trial and the right to a meaningful appeal are denied to condemnees brought before the PUC. *Lindsey* and *Humphrey* each concerned a denial of equal protection with respect to only one of those rights. The denial of both rights in the same case is doubly significant.

The rights to jury trial and meaningful appeal both check abuse of power on the part of the tribunal which conducts the trial. The availability of just one of these rights can, therefore, compensate for the absence of the other. The denial of both allows the tribunal to act with impunity.

Such a result is especially troubling in this case. While the PUC operates under a quasi-judicial aura when it sets just

compensation in a valuation proceeding, the Commission also has legislative functions. It adopts rules, regulations, and resolutions which, as policy statements, guide the staff and the Commission. Additionally, the PUC acts legislatively when it sets utility rates which requires valuing utility owned property to arrive at a valuation which is called a rate base. Having already established a valuation for rate-base purposes, the commission and its internally hired administrative law judges and staff cannot help but accept their own valuation (original cost less depreciation) as credible evidence.

This conflict between the PUC's dual roles has recently been confirmed. In February of 1986 the President of the PUC, in a concurring opinion rendered in a utility valuation proceeding, made clear that the PUC has a legislative policy in favor of encouraging the condemnation of certain investor-owned utilities. He also made it clear that the PUC will permit that policy to influence the way it measures compensation when it sits as a tribunal in such actions:

> "It is the policy of this Commission to encourage the consolidation of companies that can no longer stand alone as viable regulated utilities. The system of condemnation that we embrace to arrive at a fair market price must serve this broad policy objective and must not be permitted to operate in a counter-productive manner." *Petitions of the City of Fresno, Application Nos. 82-05-64 through 66 (Vial, P., concurring).*[2]

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[2]Copies of the opinion in question have been lodged with the Clerk of this Court. A rehearing in this case has been granted on grounds unrelated to the above.

In the same case, this philosophy was also expressed by then PUC Commissioner Bagley in a dissenting opinion.[3]

> "This decision transfers three small water companies to the City of Fresno at 'fire sale' prices. As such, it does grave injustice to the small owner and in turn tells the investor-owned water industry that when this Commission establishes market value in sale proceedings, you get a 'fair trial' and a 'hanging.'
>
> • • •
>
> "And finally a caveat: I should hope that this Commission will value these water companies on a case-by-case basis and not apply the majority opinion as an across-the-board precedent. Such a precedent would be a serious disincentive for sale and consolidation *which is contrary to the very core of Commission policy.* If, as we do, we want to encourage consolidation of small inefficient units, we must provide some price flexibility so that the small water company owner will not resist overtures to sell . . . .
>
> "It is the 'rate base' basis of the majority opinion and not the price per se to which I object." (Emphasis added.)

There is an acknowledged danger that the PUC may fix awards with an eye on its policy agenda rather than true market value. The District Court below found that petitioner had not proven the PUC was "systematically biased" and, thus, denied Petitioner's due process claim. It is precisely because bias is usually so difficult to prove that structural checks on the power of a tribunal are important. For these reasons, the denial to petitioner of both jury trial and meaningful appeal becomes especially significant.

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[3]Counsel for Amicus Curiae is a named defendant in this case in his former capacity as a PUC commissioner. The PUC has stipulated that he may appear as Amicus' counsel in this action.

IV

CONCLUSION

This Court should grant the Petition for Certiorari in this case and either reverse the decision of the Ninth Circuit or, as in *Humphrey v. Cady*, *supra*, remand for an evidentiary hearing. The decisions below establish dangerous precedents that threaten to eliminate the rational basis test as a viable standard while encouraging states to empower their agents to arbitrarily discriminate and withhold important rights.

December 30, 1986

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 445 So. Figueroa St., Los Angeles, California.

On December 30, 1986, I served the within Brief of Amicus Curiae In Re: "Jackson Water Works Inc. v. The Public Utilities Commission of the State of California" in the United States Supreme Court, October Term 1986;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 30, 1986, at Los Angeles, California

MICHELE MUIR